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APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 363

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS,

vs.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELE-CASTERS, INC., AND JACK O. GROSS, PETITIONERS,

vs.

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ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED JULY 13, 1967 (No. 363) AND JULY 27, 1967 (No. 428)
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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of:	
AMENDMENT OF SUBPART L, PART 91, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE BUSINESS RADIO SERVICE FOR MICROWAVE STATIONS TO RELAY TELEVISION SIGNALS TO COMMUNITY ANTENNA SYSTEMS.	Docket No. 14895
AMENDMENT OF SUBPART I, PART 21, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE FOR MICROWAVE STATIONS USED TO RELAY TELEVISION BROADCAST SIGNALS TO COMMUNITY ANTENNA TELEVISION SYSTEMS.	Docket No. 15233
AMENDMENT OF PARTS 21, 74, AND 91 TO ADOPT RULES AND REGULATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS.	Docket No. 15971 (RM Nos. 636, 672, 742, 755, and 766)

SECOND REPORT AND ORDER

(Adopted March 4, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER COX DISSENTING IN PART AND CONCURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER CONCURRING IN THE RESULT AND ISSUING A STATEMENT.

1. On April 23, 1965, the Commission issued a notice of inquiry and notice of proposed rulemaking in docket No. 15971 (30 F.R. 6078), which divided the proceeding into two parts. In part I the Commission reached an initial conclusion that it has jurisdiction over all community antenna television (CATV) systems, whether or not microwave facilities are used, and proposed to extend to nonmicrowave CATV systems the substantive provisions of the carriage and nonduplication rules adopted for microwave-served CATVs in dockets Nos. 14895 and 15233. *First Report and Order* in dockets Nos. 14895 and 15233, 30 F.C.C. 683; *Memorandum Opinion and Order* in dockets Nos. 14895 and 15233, 1 F.C.C. 2d 524. Part I also invited comment on various auxiliary questions affecting all CATVs which were not resolved in dockets Nos. 14895 and 15233. These have to do with color duplication, educational television stations, station-owned translators, and a possible transition period before the carriage pro-

visions are made fully applicable to existing CATV systems with limited channel capacity (notice, pars. 33–36).

2. In part II of the proceeding the Commission initiated an inquiry looking toward possible rulemaking on broader questions posed by the trend of CATV development, including (1) the effect of CATV entry into major cities on UHF independent stations, (2) the possible need for limitations on the distance a station's signal may be extended by CATV, (3) "leapfrogging,"[1] (4) program origination or alteration by CATV and the related question of pay-TV or combined CATV-pay-TV operations, and (5) various miscellaneous questions. In paragraph 49 of part II the Commission adopted an interim policy, pending the outcome of the proceeding, which provides that a microwave application to serve a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area. A like showing was required for microwave facilities to serve a CATV system in an "overshadowed" community where, because of its proximity to three or more existing stations, any new UHF station would be independent in operation. In paragraph 50 of part II, the Commission proposed an interim rule along similar lines to govern nonmicrowave CATV entry into such areas.

3. Comment on part I and paragraph 50 of part II was due at an earlier date than that specified for the remaining portions of part II,[2] which, it was anticipated, would require more lengthy consideration and possibly a further notice to afford an opportunity for comment on any specific rule proposals of the Commission (notice, pars. 64, 68). Comments and reply comments on part I and paragraph 50 have now been fully considered by the Commission. This report and order deals only with these aspects of the proceeding.

PART I. THE CARRIAGE AND NONDUPLICATION PROVISIONS

4. In proposing that the substantive provisions of the carriage and nonduplication rules governing microwave CATV systems be extended to all CATV systems, the notice emphasized (pars. 27, 30) that two main issues were presented: (1) Whether the Commission can appropriately proceed on the basis of its present statutory authority, and (2) whether any special problems of substance or procedure are posed by rules going to nonmicrowave systems. We turn now to a discussion of the first issue.

5. The threshold jurisdictional question is twofold: (*a*) Whether the Commission has jurisdiction as a matter of law over nonmicrowave

[1] "Leapfrogging" means the distribution by the CATV system of more distant signals in preference to signals of stations located much closer to the system.

[2] Comments and reply comments on pt. I and par. 50 were originally due on June 25 and July 26, 1965, respectively. By orders issued on June 16 and June 30, 1965, these times for filing were extended to July 26 and Sept. 17, 1965. Formal comments and/or reply comments have been received from the parties listed in the attached app. A. In addition, a large number of informal comments or letters from members of the public have been received and placed in the docket.

CATV systems under the present provisions of the Communications Act, and (*b*) whether it would be appropriate to exercise any such jurisdiction without a legislative enactment on the subject. In the notice we concluded initially, for the reasons set forth in our memorandum on jurisdiction attached to the notice, that CATV systems are engaged in interstate communication by wire to which the provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). It further appeared to us that the Commission's statutory powers, particularly under sections 4(i), 303 (f), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1 and 307(b) of the act and to prevent frustration of the regulatory scheme by CATV operations, irrespective of the use of microwave. However, we pointed up the following matters (par. 31 of the notice):

> While we have initially concluded that we have jurisdiction, we would carefully consider comments addressed to this aspect. The attached memorandum presents the case for jurisdiction—a strong one in our view—and is set out in order to afford interested parties a full opportunity to direct their comments to that case. Second, we adhere to our position that clarifying legislation would be desirable, and have no intention of bypassing congressional action in this field. We are clearly concerned here with new and important questions of policy and law in the communications field. That being the case, the Commission would welcome (*i*) a congressional guidance as to policy and (*ii*) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest. It is our understanding that hearings will shortly commence. The information gathered in this proceeding will, we think, be of assistance to the Congress in its consideration of the matter. In short, by instituting this proceeding, we shall gather essential data, both for the Commission and the Congress, and will have conserved valuable time and be in a position to take final effective action in either of two eventualities: (1) Congress has enacted legislation in this field which does not preclude the Commission from promulgating rules along the lines of those adopted in dockets Nos. 14895 and 15233; or (2) no legislation is forthcoming, and the comments in the rulemaking proceeding lead to the conclusion that the Commission does have present jurisdiction to extend the substantive provisions of the rules adopted in the above dockets to all CATV systems, whether or not they use microwave facilities. In the latter event, we would be remiss in our statutory duties if we had failed to exercise, without undue delay, our existing jurisdiction and authority to promote a public interest in this important area. The rulemaking proceeding instituted by this notice will thus be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.

6. Following the issuance of the notice, H.R. 7715 was introduced in the House on April 28, 1965, and hearings on the bill were held before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce in May and June 1965. In the Commission's testimony concerning the bill, it was stated that the Commission did "not contemplate applying any new rules that we may enact with respect to the rest of the CATV industry until 1966; in other words, until at least after this session of Congress is over and it has had the ability to consider this problem." (Hearings before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce on H.R. 7715, 89th Cong., 1st sess., p. 25.) No bill relating to CATV has been introduced in the Senate, and the 89th Congress adjourned its first session without enacting any legislation on CATV.

7. We think it appropriate, therefore, to take up without further delay part I and paragraph 50 of the rulemaking proceeding. Here we note that CATV is developing and expanding at a very rapid rate (see pars. 31–39, within). We cannot ignore the increasing risk of adverse impact on the "public interest in the larger and more effective use of radio" (sec. 303(g)) which accompanies the burgeoning CATV development. See paragraphs 116–117; part II, within. Further, it is contrary to sound regulation for carriage and nonduplication to be applicable to the microwave CATV system and inapplicable to the nonmicrowave, which constitutes the other three-fourths of the industry. And, if the carriage and nonduplication provisions are to be applied to nonmicrowave systems, it would obviously minimize the disruption to the viewing public to do so as soon as possible—before a large number of incipient CATV systems commence operation and their subscribers become accustomed to service not in compliance with the rules. It would also appear to entail less hardship to the new CATV operator to commence operation under the rules than to undergo a subsequent conversion. Moreover, removal of the present uncertainty would assist local franchising authorities, as well as franchise applicants. We have received several inquiries from local authorities as to when a decision might be expected, with an indication in some instances that action on franchise applications was being withheld pending our decision. The "introduction of as much stability as possible into the planning perspective of those affected by our regulation" is regarded by us as a "highly desirable objective" (first report and order in dockets Nos. 14895 and 15233, par. 78). For all these considerations, developed more fully within, we think it our responsibility under the Communications Act to resolve the issues in part I and paragraph 50.

A. Jurisdiction as a Matter of Law

8. While the comments filed in support of present jurisdiction outnumber those opposed,[3] there appears to be no need to review the substance of the supporting comments here. The bulk of the supporting comments either restate essentially the same matters set forth in the Commission's memorandum on its jurisdiction and authority

[3] *Supporting comments* were filed by: National Association of Broadcasters; Association of Maximum Service Telecasters, Inc.; Storer Broadcasting Co.; American Broadcasting Co.; Westinghouse Broadcasting Co., Inc.; Fuqua Industries, Inc.; WTVY, Inc.; Snyder & Associates; Western Slope Broadcasting Co.; Black Canon Broadcasting Co.; Mesa Verde Broadcasting Co.; Houston Post Co.; WKBH Television, Inc.; Bonneville International Corp.; Mobile Video Tapes, Inc.; D. H. Overmyer; Aroostook Broadcasting Corp.; Taft Broadcasting Co.; WJAC, Inc.; Springfield Television Broadcasting Corp.; Midwest Television, Inc.; West Central Broadcasting Co.; Rust Craft Broadcasting Co.; WGAL Television, Inc.; American Farm Bureau Federation; National Farmers Union; National Grange; Tri-State TV Translators Association; labor organizations affiliated with the AFL–CIO; Eastern Educational Network; and commenting jointly, television stations KHOU–TV; KOTV, KXTX, WANE–TV, WAVE–TV, WFIE–TV, WFRV, WISH–TV, WJXT, WMT–TV, WNOK–TV, WTOP–TV. *Opposition*—Commenting in opposition to jurisdiction were: National Community Television Association, Inc.; Smith & Pepper (on behalf of 150 CATV systems); Columbia Broadcasting System; National Broadcasting Co.; TV Cable Service of Abilene, Inc.; Entron, Inc.; American Cable Television, Inc.; Meredith Broadcasting Co.; Triangle Publications, Inc.; Jerrold Electronics Corp.; International Teleprompter Corp.; Montgomery Television Association, Inc.; and Journal Co. *Other*—American Telephone & Telegraph Co. and U.S. Independent Telephone Association took no position on the jurisdictional question but requested that the carriage and nonduplication provisions be applied to CATV systems directly rather than to microwave common carriers.

(notice, attachment B) or express agreement with that memorandum.[4] Since we believe that the case for jurisdiction is sufficiently set forth in our memorandum, a copy of which is attached to this document for convenient reference (attachment C), we shall discuss only the arguments made in the opposition comments.

9. The comments urging a want of jurisdiction make three principal arguments. It is asserted, first, that the Communications Act contains no provision granting the Commission authority over CATV systems. Second, it is contended that there are specific provisions in the act which show a lack of authority. And, third, it is urged that the Commission itself has repeatedly denied jurisdiction over CATV systems, that Congress is aware of and has acquiesced in this administrative interpretation, and that principles of statutory construction foreclose the Commission from now claiming jurisdiction. We shall discuss these arguments in order.

10. The contention that the Communications Act contains no provision granting the Commission authority over CATV systems takes issue with the sufficiency of the statutory base set forth in the Commission's memorandum (pp. 2–7). We there relied on the fact that section 2(a) states that the "provisions of this act shall apply to all interstate and foreign communication by wire or radio * * * and to all persons engaged within the United States in such communication," and concluded that CATV systems are engaged in "communication by wire," within the meaning of section 3(a), which is interstate in nature. With respect to the provisions of the act to be applied, we stated that the authority conferred by section 303(h) to issue rules establishing the area or zone to be served by any station includes the power to prevent infringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act), and specifically a person subject to the provisions of the act, and encompasses authority to specify by rule the conditions under which the station's signal may be extended beyond the prescribed service area or zone by CATV. Moreover, apart from section 303(h), the general rulemaking authority of the Commission (secs. 4(i) and 303 (f) and (r)) includes authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) by CATV—an "interstate communication by wire" to which the act's provisions are applicable (secs. 2(a) and 3(a)).

11. It is asserted that these sections do not suffice to support jurisdiction because it is necessary to find some specific provision of the act expressly conferring jurisdiction over the subject matter of CATV. The authorities cited in our memorandum (pp. 4–6) to the effect that our authority does not depend on a specific reference to CATV or CATV practices in the act[5] are distinguished on the ground that they

[4] While Storer Broadcasting Co. does not agree with the impact argument (Commission's memorandum, pp. 4–5) as a jurisdictional base, it takes the position that the Commission now has limited jurisdiction over all CATV systems which is sufficient to support the measures proposed in pt. I and par. 50.

[5] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 218–219; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203; *American Trucking Association* v. *United States*, 344 U.S. 298, 309–311; *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110; *Houston, East and West Texas Railway Co.* v. *United States*, 234 U.S. 342; *Public Service Commission of State of New York* v. *Federal Power Commission*, 327 F. 2d 893, 897 (C.A.D.C.).

concern authority over unspecified practices of regulated licensees rather than the power to regulate unspecified persons or businesses not licensed under the act. Unless specific authority is required for regulation of nonlicensees, it is argued, the Commission could utilize its general rulemaking authority to regulate any business (such as amusements, program producers, etc.) which has an impact on broadcasting or uses communications facilities.

12. The attempted distinction, even assuming arguendo its validity, does not fit the situation here. We are not presented with the question of whether the Commission's broad powers to take action necessary to carry out the provisions of the act include authority to regulate a business not subject to the act merely because of some impact on, or use of, interstate communications under the act.[6] CATV systems differ from most other businesses in that they are themselves engaged in "interstate communication by wire," a business to which the act's provisions are expressly applicable (secs. 2(a), 3(a)).[7] Moreover, they physically intercept and extend television signals, and thus have a uniquely close relationship to the regulatory scheme embodied in sections 303(h) and 307(b). We are not powerless to prevent frustration of our action under those sections by persons subject to the act merely because the licensing provisions of the statute are inapplicable to them. Sections 312 (b) and (c) provide for the issuance of a cease and desist order against "any person"—not merely any "licensee or permittee"—who has "violated or failed to observe any rule or regulation of the Commission authorized in this act * * *."

13. It is further asserted that *Federal Power Commission* v. *Panhandle Eastern Pipeline Company*, 337 U.S. 498, precludes a conclusion that the general rulemaking power of the Commission encompasses authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) and 303(h) by CATV. However, the *Panhandle* case is readily distinguishable. That case was decided upon the basis of a specific provision in the Natural Gas Act which denied the Federal Power Commission jurisdiction to deal with the problem there involved.[8] Section 1(b) of the Natural Gas Act provides that the "provisions of this Act shall apply * * * to the sale in interstate commerce of natural gas for resale * * * but shall not apply * * * to the production or gathering

[6] We have not claimed plenary power to regulate any business which may have some impact on broadcasting or other interstate communication by wire or radio. In the jurisdictional memorandum we stated that the "Commission clearly has no jurisdiction over bowling alleys or theaters, for example * * *." Moreover, we sought and obtained specific statutory authority to regulate the manufacture of television receivers shipped in interstate commerce for sale to the public (Public Law 87-529, 47 U.S.C. 303(s)). There may be instances, of course, where the Commission's regulatory power appropriately extends to some activities of persons not engaged in communication by wire or radio. But there is no necessity to determine the limits or basis for such authority here.

[7] Since CATV systems fall within the definition of communication by wire and their operations are interstate in nature, it makes no difference that they are not expressly mentioned by name. The act applies to "*all* interstate communication by wire or radio" and to "*all* persons engaged in such communication" [sec. 2(a), emphasis added]. For that matter, prior to the 1962 amendment incorporating sec. 303(s), the word "television" did not appear in the act. Yet, it has long been established that the act applies to television because it falls within the definitions of "radio communication" and "transmission of energy by radio" contained in sec. 3. *Allen B. Dumont Labs, Inc.*, v. *Carroll*, 184 F. 2d 153, 155 (C.A. 3), *cert. den.* 340 U.S. 929.

[8] Other Federal Power Commission cases cited in the comments, *Amerada Petroleum Corp.* v. *Federal Power Commission*, 334 F. 2d 404 (C.A. 8), and *Pan American Petroleum Corp.* v. *Federal Power Commission*, 339 F. 2d 694, are similarly inapposite since they involved a lack of jurisdiction predicated upon a statutory exclusion.

of natural gas" (52 Stat. 821, 15 U.S.C. sec. 717(b)). The court held that the transfer of gas leases fell within the exclusion as to the "production or gathering of natural gas" and hence lay outside the scope of the Power Commission's regulatory powers. In declining to find authority in the Power Commission's general rulemaking powers, the court stated that the "power to do the things appropriate to carry out the provisions of the act can hardly be taken to rescind a prohibition against certain actions" (337 U.S. at 508). By contrast, there is no provision in the Communications Act which specifically excludes CATV systems from the Commission's jurisdiction. On the contrary, section 2(a) states that the "provisions of this Act shall apply to *all* interstate communication by wire or radio * * * and to *all* persons engaged within the United States in such communication * * *. [Emphasis added.]" Moreover, *Panhandle* has been construed narrowly in a recent case arising under the Natural Gas Act, which sustained the Power Commission's jurisdiction over gas leases for resale in interstate commerce. *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 403–404.

14. The argument that the Communications Act contains language expressly excluding jurisdiction over CATV systems is predicated primarily on the provisions of section 2(b) and section 214(a) of the act. Section 2(b) states that nothing in the act shall be construed to give the Commission jurisdiction with respect to "intrastate communication service by wire or radio of any carrier" or "any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities located in an adjoining State * * * of another carrier * * *." Section 214(a) provides, in pertinent part, that "no carrier" shall construct or operate a line without a prior certificate from the Commission, provided, however, that no certificate is required for construction or operation of "a line within a single State unless such line constitutes part of an interstate line." It further states: "As used in this section the term 'line' means any channel of communication established by the interconnection of two or more existing channels."

15. We are not persuaded that these sections demonstrate a statutory denial of jurisdiction over CATV systems. In the first place, both sections by their terms apply to "carriers" and we have repeatedly ruled that CATV systems are not "carriers" within the meaning of section 3(h) of the act. *Frontier Broadcasting Co.*, 24 F.C.C. 251; *CATV and TV Repeater Services*, 26 F.C.C. 403, 427–428; *WSTV, Inc.* v. *Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184; *Philadelphia Television Broadcasting Co., et al.*, FCC 65–702 (Aug. 2, 1965). Nor are television stations "carriers" under section 3(h). Moreover, even if CATV systems were to be deemed carriers, their operations are interstate in nature since they are carrying interstate television signals. A common carrier carrying television signals does not fall within the exemption in section 2(b)(1) because its physical facilities are located in only one State; it "performs an interstate communications service." *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 352 F. 2d 729 (C.A.D.C.); *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Pacific*

Telatronics, Inc., 4 Pike & Fischer, R.R. 145; and cf. *California Interstate Telephone Co.* v. *Federal Communications Commission*, 328 F. 2d 816 (C.A.D.C.).[9] See also, *United States* v. *American Telephone and Telegraph Co.*, 57 F. Supp. 451, 454 (S.D.N.Y.), aff'd *per curiam*, *sub nom. Hotel Astor* v. *United States*, 325 U.S. 837. By the same token a CATV system, if it were a carrier, would constitute "part of an interstate line" for purposes of section 214(a), even though its facilities were located within a single State.

16. The most vigorously pressed argument against jurisdiction is the assertion that the Commission is estopped by past disclaimers of jurisdiction over CATV systems and congressional acquiescence in those disclaimers (see par. 28 of the notice herein). Reliance is placed on the principle of statutory construction that a consistent, longstanding administrative interpretation is entitled to great weight, particularly where Congress is aware of the administrative determination and has subsequently amended the statute without changing the applicable section.[10] Whatever the force of this principle in other circumstances, we do not think that it is dispositive of the legal question of our jurisdiction here.

17. Initially, it bears noting that some of the precedents cited as establishing a consistent contrary position primarily concerned matters upon which we do not rely as a basis for jurisdiction. We have consistently held that CATV systems are not common carriers within the meaning of section 3(h), and hence do not come within the provisions of title II applicable to carriers. *Frontier Broadcasting Company*, 24 F.C.C. 251; *CATV and TV Repeater Services*, 26 F.C.C. 403, 427–428; *WSTV, Inc.* v. *Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184. But we have not proposed to depart from this ruling, which has been reaffirmed since the issuance of the notice herein. *Philadelphia Television Broadcasters Co., et al.* v. *Rollins Broadcasting, Inc.*, docket No. 15926 (FCC 65–702, Aug. 2, 1965) now pending on appeal (case No. 19577, C.A.D.C.).[9] Nor have we departed from our earlier rulings that CATVs are not engaged in "broadcasting" within the meaning of section 3(o) and are not encompassed within section 325(a). *CATV and TV Repeater Services*, 26 F.C.C. 403, 428–430. In areas closer to the claimed basis for jurisdiction, the precedents do not reflect a consistent contrary position.[11] Thus, while we initially

[9] That the carrier in *Idaho Microwave* was carrying the signal of a television station located in another State is not of controlling significance. All television broadcasting is interstate in nature. *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Capital City Telephone Co.*, 3 F.C.C. 189, 193–194; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279. Moreover, in the case of network programing the communication link between the network and the station transmitter forms an additional part of the interstate chain of communication. *Ward*, *supra*, 300 F. 2d at 819.

[10] Cases cited to us in this connection include: *Hanover Bank, Ex.* v. *C.I.R.*, 369 U.S. 672, 686–687; *United States* v. *Leslie Salt Co.*, 350 U.S. 382, 396–397; *Norwegian Nitrogeon Co.* v. *United States*, 288 U.S. 294, 315; *Luckenback Steamship Co.* v. *United States*, 280 U.S. 173, 183; *Cammarano* v. *United States*, 358 U.S. 498.

[11] The position of Congress, if it has acquiesced in the Commission's rulings, is not clear. It is true, as set forth in the notice, par. 28, that following our decision in *CATV and TV Repeater Services*, 26 F.C.C. 403, the 86th Congress gave extensive consideration to some of the various legislative proposals on CATV submitted by the Commission and others, but enacted no legislation. Moreover, bills introduced in subsequent Congresses received no action. However, Congress also took no action after being apprised of the partial reversal of that decision in *Carter Mountain*. 29th FCC Annual Report, 1963. Congress likewise is aware of our initial conclusion as to jurisdiction in the notice herein issued on Apr. 23, 1965. Although a subcommittee of the House Commerce Committee subsequently held hearings on H.R. 7715, no committee report issued in the first session of the 89th Congress, and no legislation on CATV was considered or introduced in the Senate.

disclaimed jurisdiction to deny a common carrier microwave authorization to relay television signals to CATV systems (*Intermountain Microwave*, 24 F.C.C. 54; *CATV and TV Repeater Services*, 26 F.C.C. 403, 431–433), this ruling was later reversed in our *Carter Mountain* decision, 32 F.C.C. 459, which was sustained on judicial review. *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359, 364 (C.A.D.C.), *cert. den.* 375 U.S. 951. In *CATV and TV Repeater Services*, we disclaimed plenary power, under section 303 (a), (b), (f), (g), (i), and (r), to "regulate any and all enterprises which happen to be connected with one of the many aspects of communications" (28 F.C.C. at 429)—a power which is not claimed here. However, we assumed (without deciding) that CATVs are within the scope of section 3(a) (26 F.C.C. at 428), and also found it unnecessary to pass on the question of our authority to regulate them directly because of adverse effect on broadcasting (26 F.C.C. at 431). And, finally, we have not previously ruled on the question of whether section 303(h) encompasses authority to regulate CATV.

18. More important, even if our past rulings in this troublesome area had been consistent, we are not estopped from correcting a ruling of law which appears to be clearly erroneous. *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359, 364 (C.A.D.C.), *cert. den.* 375 U.S. 951; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672; *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 404–406.[12] As the Supreme Court commented in the *Phillips Petroleum* case, in sustaining the Federal Power Commission's jurisdiction over the sale of gas by gas producers for resale in interstate commerce despite that agency's consistent past disclaimer of jurisdiction, "even consistent error is still error" (347 U.S. 672, 678, footnote 5). Moreover, in *United Gas Improvement* the authority of the Power Commission over gas leases for resale in interstate commerce was upheld, notwithstanding the fact that the agency had initially concluded in the same proceeding that it lacked jurisdiction and then reversed itself on remand (on another ground) from a court of appeals decision which assumed a lack of authority on the basis of *Panhandle* (381 U.S. at 404–406). *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 143, 145 (C.A.D.C.).

19. As indicated in the notice, (par. 28), our "jurisdiction to regulate nonmicrowave CATV systems under the present provisions of the Communications Act is obviously subject to reasonable difference of opinion." However, the arguments discussed above do not persuade us that jurisdiction is lacking, and no other bar to jurisdiction has been brought to our attention. After careful consideration of all the comments we are convinced that the case for present jurisdiction is a strong one. Accordingly, for the reasons set forth above and in our memorandum as to jurisdiction (app. C), we conclude that CATV systems are engaged in interstate communication by wire to which the

[12] See also, *Calbeck* v. *Travellers Ins. Co.*, 370 U.S. 114, 127, footnote 15; *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 183; *Association of Clerical Employees* v. *Brotherhood of R. & S.S. Clerks*, 85 F. 2d 152, 156 (C.A. 7).

provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). We further conclude that our statutory powers, particularly under section 4(i), 303 (f), (g), (h), and (r) include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1, 307(b), and 303(s) of the act and to prevent frustration of the regulatory scheme by CATV operations, whether or not microwave facilities are used. The rules proposed in part I and paragraph 50 of the notice are within our legal authority.

B. Assertion of Jurisdiction

20. We turn now to the further question of whether jurisdiction over nonmicrowave CATV should be exercised at this time. Most of the comments in support of jurisdiction favored an immediate extension of the carriage and nonduplication requirements to nonmicrowave CATV systems, and the adoption of an interim policy either along the lines proposed in paragraph 50 of the notice or of broader scope. However, some of the supporting comments and many of the opposition comments took the position that we should not exercise jurisdiction, even if present, until Congress has legislated on the subject. It is urged that this would provide needed policy guidelines and avoid protracted litigation on the jurisdictional issue.

21. We stated in the notice (par. 31) that we would "welcome (*i*) a congressional guidance as to policy, and (*ii*) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest." In this report, we stress again the desirability in our view of congressional guidance in this important area. But thus far the congressional guidance or clarification has not been forthcoming; and in the present circumstances, our decision cannot properly turn on a desire to avoid litigation or on the hope of obtaining policy guidance in the CATV field. The Commission has not been "left at large" as to the criterion to be following in performing our statutory duties in the dynamic communications field. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219–220. The public interest touchstone provided by Congress afforded a sufficient standard for our decision to adopt the carriage and nonduplication requirements for microwave-served CATV systems in the first report and order in dockets Nos. 14895 and 15233. Since the "considerations underlying our conclusion that this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service apply equally" to nonmicrowave CATV systems (notice, par. 27), there is likewise a sufficient standard for judgment here. Finally, our action with respect to the paragraph 50 proposal is similarly dictated by the "public interest in the larger and more effective use of radio" (sec. 303(g)).

22. Most of the comments agree that, apart from the basis for jurisdiction, there is no significant difference between microwave and nonmicrowave systems. However, National Community Television Association, Inc. (NCTA), asserts that there is no basis for assuming

they are alike. It points to no factual distinction. Rather, NCTA renews its contentions in dockets Nos. 14895 and 15233 that no adequate factfinding inquiry has been conducted, and claims further that adverse impact has not been established and cannot support an assertion of jurisdiction. In this connection, NCTA has appended to its comments the material it submitted before the House subcommittee in hearings on H.R. 7715. It urges particularly that the 15 days before and after nonduplication period is unjustified, and has no reasonable relationship to the showing of nonnetwork programing. NCTA's staff has undertaken a study to test the validity of the Commission's sample week network study (first report, pars. 104–109), and has found that the data developed by the Commission supports its conclusion that delayed programing occurs most frequently among affiliates in the mountain time zone, and there in one- and two-station markets. NCTA claims that its study of 33 mountain time zone stations with CATV penetration shows no adverse consequences (NCTA comments, exhibit A). It points in addition to specific examples of small market stations which have allegedly increased circulation and maintained the same or a higher network hourly rate since 1960, despite substantial CATV penetration of their service areas (NCTA comments, exhibits A and B).

23. While the inferences NCTA draws from its studies are sharply criticized in the reply comments of Association of Maximum Service Telecasters (AMST), we do not think it necessary or useful to set forth the contentions of each or to discuss their dispute as to individual situations. The NCTA appendixes do not differentiate between microwave and nonmicrowave CATV systems; on their face they constitute an attack on the validity of the first report and order in dockets Nos. 14895 and 15233. But the supplementary material upon which NCTA now relies as indicating a lack of past impact is similar in nature to the showing there considered at length and would not in itself warrant reversal of our conclusions.[13] Indeed, NCTA, in relying upon its showing, simply ignores the two most important grounds of our decision, namely, (*i*) the fair competition ground, and (*ii*) the economic impact ground, *based on the CATV trend in recent years.* Since this is so, it may be well to restate those grounds briefly, and to take account of current information pertinent to those grounds.

24. In the first report and order in dockets Nos. 14895 and 15233, we concluded that CATV serves the public interest when it provides program choices not locally available off the air and acts as a supplement rather than a substitute for off-the-air television service, explaining our principal reasons as follows (par. 44):

> * * * Because of the prohibitive cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to *all* people of the United States on a fair, efficient, and

[13] We have decided, for the reasons set forth in pars. 47–55 below, to delete the provision for nonduplication 15 days before and after the local broadcast and to substitute a requirement for nonduplication only on the same day as the local broadcast. Thus, our resolution of this matter affords NCTA substantially the relief it has requested.

equitable basis (secs. 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others. Nor would it be compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services.

25. Our determination to adopt the carriage and nonduplication requirements rested on two basic grounds: (1) That failure to carry local stations and duplication of their programs are unfair competitive practices, which are inconsistent with the supplementary role of CATV (pars. 49–57, 76), and (2) that these requirements were necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential (pars. 58–75, 77).

26. With respect to the first ground, we found that the CATV system which fails to carry the local station on its system has in practical effect cut off the station from access to CATV subscribers (par. 51). We stated (par. 57):

> As a competitive practice, the failure or refusal by a CATV system to carry the signal of a local station is plainly inconsistent with our belief that CATV service should supplement, but not replace, off-the-air television service. The cable system that follows such a practice offers the subscriber the benefits of additional television service at the price of blocking or impeding his access to available off-the-air signals. * * *
>
> Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest. Only if we were persuaded that the overall impact of CATV competition upon broadcasting would be entirely negligible would we consider countenancing such a practice.

27. We further pointed out that CATV, though distributing the programs of the television broadcast service, stands outside its normal program distribution process and fails to recognize the reasonable exclusivity for which the local stations have bargained in the program market when it duplicates local programing via the signals of distant stations (pars. 52–56). We summarized our conclusion that this was unfair and inconsistent with CATV's supplementary role as follows (par. 57):

> In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programing via the signals of distant stations as a fair method of competition. We do not regard the patterns of exclusivity created in the existing system for the distribution of television programs as sacrosanct. We think it apparent, however, that the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs. We think the basic congressional judgment underlying section 325(a) limitation on rebroadcasting is the same.
>
> Nor do we consider the duplication of existing off-the-air service to be consistent with CATV's appropriate role as a supplementary service. Whatever the ultimate impact of CATV competition upon the revenues and operation of competing stations, duplication is highly likely to affect the audience

for the specific programs involved. And it does so without generally offering the public a substantially different service. We believe that a service such as CATV, which lives on the product of the existing television service, should at a minimum give some measure of recognition to the fundamental distribution practices which have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries. Once again, unless we were convinced that the impact of CATV competition upon broadcasting service would be negligible, we would favor some restrictions upon the ability of CATV systems to duplicate the programs of local broadcasting systems, as a partial equalization of the conditions under which CATV and broadcasting service compete. [Footnotes omitted.]

28. We stated that the foregoing grounds were "enough to justify regulatory action" (par. 58) and that "every station affected is entitled to appropriate carriage and nonduplication benefits—irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station" (par. 76). But, as stated, we also turned to another ground based on the economic impact of CATV upon television broadcast development. We considered at some length the data and arguments before us on the question of impact (pars. 58–75), finding—as in 1959—that it is "impossible, with the data at hand, to isolate reliably the effects of CATV competition from all of the other factors which operate to produce particular financial results in differing settings" (par. 68). However, taking account of nationwide trends affecting the nature of CATV offerings, the character of the markets entered, and the degree of penetration achieved, we also found it plain that CATV could have a substantial negative effect upon station revenues and audiences even though we lack the tools to measure precisely the degree of impact (pars. 65–69). We further found reason to believe that the impact was likely to be "more serious in the future than it has been in the past" (par. 69), and stressed our concern with the effect of explosive CATV growth in a critical period for UHF development (pars. 71–72). In sum, the Commission's judgment on this ground was based very largely, not upon the past, but upon the trends which were already evident and whose dimensions called for action now to assure the public interest in the future.

29. The additional showing made in the appendixes to the NCTA comments is not directed to the above crucial considerations concerning the trends in the CATV or UHF fields. Instead, it focuses upon certain situations which, it claims, establish that CATV has no adverse impact upon television broadcasting. But each of its examples is sharply disputed by AMST, which points to significant impact in some cases or sets forth other factors for the improvement in the situation of the television station in the face of CATV competition. For example, AMST notes that several stations whose network hourly rate has not declined since 1960 were already at or near the minimum rate for the network involved (AMST reply comments, pp. 27–28, attachment A, pp. 10–14). It attributes whatever success station WLUC–TV, Marquette, Mich., has enjoyed in recent years to new management beginning in 1960 and states that the station has suffered a decline in average quarterly hour audience while local revenues have

remained stagnant (AMST reply comments, pp. 29–30, attachment A, p. 14). AMST also points out that WBOC–TV, Salisbury, Md., following a change in ownership in 1961 and the infusion of a substantial financial investment, extended its hours of operation, improved its programing, and doubled its service area through a substantial power increase. (AMST reply comments, pp. 31–32, attachment A, pp. 15–16.)

30. It would, we think, serve no useful purpose to delve into each of those situations. For even assuming that it were possible to isolate the significance of CATV in each situation from other factors (as it was feasible in the *Carter Mountain* case, first report, par. 64), it would not afford greater insight into the crucial aspect of the matter—the explosive growth and changing character of CATV and its possible impact upon television broadcasting in the future. And, as to that aspect, events since the issuance of the first report reinforce the judgment made by us upon the basis of the above-mentioned trends in the industry. For, as the comments in this proceeding show, without dispute in this respect, the trends described in paragraph 65 of the first report have become even more pronounced. We shall briefly review those trends in light of their importance to our judgment.

31. In the first report we relied on estimates in the Seiden report which were based on data compiled in 1964.[14] The Seiden report stated (p. 2) that there were approximately 1,300 CATV systems serving approximately 1.2 million TV homes. The reply comments of AMST, filed on September 17, 1965, contain the following estimates as of mid-1965 (AMST reply comments, attachment A, prepared by Economic Associates, Inc., of Washington, D.C., using data from Television Factbook (No. 35) and Television Digest):

Communities with operating CATVs	1,847
Communities with CATVs franchised (but not yet operating)	758
Communities with CATV applications pending	938

While these figures are not tendered as precisely accurate,[15] the rapidly accelerating rate of growth is confirmed in statistics given by licensees commenting on the situation within their service areas,[16] in the trade press, and in letters received by the Commission from local franchising authorities and other members of the public.

32. In addition, the channel capacity of CATV systems is increasing. According to the Seiden report (pp. 2, 54) the usual CATV system in 1964 delivered five signals and 85 percent of all systems delivered between three and seven signals. However, there is indication in the record that most of the new CATV systems have a channel capacity of 12 channels and many of the older systems are expanding their original capacity. The AMST reply comments (attachment A) contain the following table showing the cable capacity for the 753 CATV systems for which it was able to obtain data:[17]

[14] This estimate was based on comments filed in dockets Nos. 14895 and 15233 and the report submitted to us by Dr. Martin H. Seiden, entitled "An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry" (Government Printing Office, February 1965), hereafter referred to as the "Seiden report."

[15] There are other estimates (see par. 116, describing the Television Digest estimate), but whatever the estimate, CATV growth is clearly explosive in nature.

[16] E.g., comments of Midwest Television, Inc.; West Central Broadcasting Co.; WKBH Television, Inc.; Mobile Video Tapes, Inc.; and Bonneville International Corp.

[17] The data were compiled from reports in Television Factbook (No. 35), Television Digest, questionnaires on file at the Commission, and ARB publications.

CATVs starting	Capacity, in number of channels (including FM) [1]										
	2	3	4	5	6	7	8	9	10	11	12
Thru 1951	.....	3	.....	28	2	1	.....	.....	.....	.....	13
1952	.....	3	.....	26	.....	1	1	.....	.....	.....	15
1953	.....	3	1	36	1	4	.....	2	1	.....	10
1954	1	5	.....	39	3	3	.....	2	1	.....	20
1955	.....	5	.....	43	2	2	.....	4	.....	.....	11
1956	.....	3	1	30	.....	.....	.....	1	.....	.....	10
1957	1	.....	.....	23	.....	3	1	.....	1	.....	5
1958	.....	2	.....	27	1	.....	1	.....	1	.....	7
1959	.....	.....	1	28	.....	.....	1	1	.....	.....	4
1960	.....	2	.....	26	.....	2	1	1	.....	.....	6
1961	.....	.....	.....	21	.....	1	.....	.....	1	.....	9
1962	1	.....	.....	25	.....	.....	.....	1	.....	.....	16
1963	.....	.....	.....	21	1	1	1	.....	.....	.....	33
1964	.....	.....	.....	15	1	2	2	9	.....	3	53
Thru July 1965	.....	.....	.....	5	.....	1	2	1	.....	.....	44
Totals	3	26	3	393	11	21	10	22	5	3	256

[1] Includes expansions subsequent to starting date. Limitations of the source data make it impossible to determine the original capacity of most of these systems.

The expanding channel capacity is also reflected in the answers submitted to our questionnaire sent to all known CATV systems in connection with the transition period question. (See pars. 103–107, within.)

33. It further appears that CATV activity is accelerating in areas where there is the greatest interest in UHF development. The comments of AMST list all communities or metropolitan areas where UHF stations were operating, authorized, or applied for as of July 8, 1965, and indicate the extent of colocated CATV activity (AMST comments, attachment C, table 2).[18] The results are summarized by AMST as follows (comments, p. 59):

> **There are 237 UHF stations and 93 educational stations either operating or with outstanding construction permits or for which applications are pending in communities or metropolitan areas with a total population of over 112 million. The cities and metropolitan areas with CATV systems operating, pending, or applied for account for at least 85 million people. At least 145 communities or standard metropolitan areas with UHF stations operating, authorized, or applied for also have CATV activity. In 68 such communities or metropolitan areas where there are already operating CATV systems; at least 67 have CATV systems franchised but not operating, and at least 93 have CATV applications proposed.**

34. The situation in central Illinois is described by Midwest Television, Inc. (Midwest), licensee of VHF station WCIA, Champaign, Ill.; UHF station WMBC–TV, Peoria, Ill.; and applicant for a new UHF station in Springfield, Ill.[19] Midwest states that CATV is in process of growth in virtually all of the major communities served by WCIA, including Champaign and Urbana themselves.[20] Franchise applications have been filed or proposed in at least 12 communities within the WCIA grade B service area, and CATV systems are operating, under construction, or franchised in some 15 more. These 27 communities have a total population of 464,500—nearly one-half of

[18] According to AMST, table 2 is limited to the central communities or metropolitan areas where there is UHF activity, and does not include CATV activity elsewhere within the service area of a station located in the community or metropolitan area.

[19] Midwest is also the licensee of KFMB, San Diego, Calif.

[20] Champaign has one VHF and one UHF station, and is also the location of a UHF translator of a Decatur UHF station.

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the total population within WCIA's grade B service area. Within the grade B service areas of WMBD–TV, Peoria, and of W71AE, Midwest's La Salle translator, CATV is at various stages—from franchise proposals to actual operation—in at least five communities, including Peoria itself (which has three operating UHF stations and a vacant UHF commercial assignment). The total urban population of these five communities is 221,294—between one-third and one-half of the total population in the grade B service areas of WMBD–TV and the La Salle translator. In Springfield (which has one operating UHF station and applications pending for two new UHF stations), applications for CATV franchises are under active consideration in Springfield and another community located in the grade B contour of both proposed UHF stations. The total urban population of these 2 cities is 92,072—approximately one-half of the total population within the grade B contour of Midwest's proposed new UHF station. Midwest states that the proposals for CATV in Springfield, Peoria, Champaign, and Urbana have all been announced since April 23, 1965, and that at least eight new CATV operators filed applications for local franchises in central Illinois during the first 2 weeks of July.

35. A description of CATV growth in the Rio Grande Valley of Texas is given by Mobile Video Tapes, Inc., the licensee of KRVG–TV in Weslaco-Harlingen, Tex. According to Mobile Video Tapes, Weslaco has a 1960 census population of 15,649 and the population of the Harlingen-San Benito urbanized area is 61,658. It states that J. Walter Thompson Co. (*Population and Its Distribution, The United States Markets*, 8th ed., 1961), lists the Brownsville-Harlingen-San Benito market (which includes Weslaco) as a class "C" market, the 143d market in the United States, with a population of only 151,098. The ARB total net weekly circulation of KRGV, as of March 1964, was only 75,100 homes. CATV franchises have been granted in five towns within its service area and other CATV systems are proposed. The communities with CATV franchises, their populations, and the grade of KRVG coverage are given by Mobile Video Tapes as follows:

Community	1960 census population	KRGV coverage
Brownsville	48,040	Grade A.
Edinburg	18,706	City Grade.
McAllen	32,728	Grade A.
Mission	14,081	Grade B.
Pharr	14,106	City Grade.

Mobile Video Tapes points out that this "constitutes the heart of the market—84.4 percent of the population shown by J. Walter Thompson for the entire Brownsville-Harlingen-San Benito market."

36. It appears, moreover, that there is significant CATV activity in the vicinity of fairly large cities with multiple channel assignments. The AMST comments (attachment C, tables IA, B, and C)[21] tabulate the CATV systems in operation, franchised or applied for within the

[21] Corrections to these tables were supplied in an "addendum" to the AMST comments submitted on Aug. 12, 1965.

grade A and B contours of existing or potential VHF and UHF stations in 11 areas "believed to be centers of considerable CATV 'activity'": Bakersfield and Sacramento, Calif.; Orlando and St. Petersburg, Fla.; Rockford, Ill.; Evansville and Indianapolis, Ind.; Rochester and Utica, N.Y.; and Columbus and Dayton, Ohio. The extent of CATV penetration is detailed in tables IA, B, and C. All three give separate figures for grade A and grade B contours, for VHF and UHF respectively. Table IA shows the penetration in terms of number of places in which CATV franchises have been granted or applied for. Table IB gives the equivalent data in terms of potential CATV households[22] compared with the total number of households within broadcast contours. Table IC converts the data in IB to percentages of total number of households within the broadcast contours.

37. The analysis shows that in these 11 areas there are approximately 230 places in which a CATV system was operating, franchised, or proposed (as of July 8, 1965) within the grade B contours of existing or potential VHF and UHF stations located in the central community of each of the 11 markets. These 230 places contain nearly 1,900,000 households. In Bakersfield, Calif., an all UHF market, almost two-thirds of the potential UHF audience is already franchised to CATV systems. In Utica, N.Y., the figure is 44 percent. If already submitted or proposed applications result in franchises, a UHF station in Columbus, Ohio, would have CATVs potentially competing for 60 percent of its market and a VHF station for more than half. Existing and pending CATVs in the Indianapolis area involve half the VHF market and about three-fifths of the UHF market. In Sacramento, the CATV potential comes to over 40 percent of the UHF market and nearly half the VHF.

38. There is also widespread CATV activity within major cities. Our attention has been called to the asserted intent of CATV interests to wire up "almost all American cities—small and large" and 85 percent of all television sets—40 million homes.[23] The December 1965 issue of Television Magazine (vol. 22, No. 12) states that franchise applications have been filed in San Francisco, Seattle, Pittsburgh, Baltimore, Fresno, Columbus, Tucson, Birmingham, Providence, and Sacramento. Two of the commenting parties in this proceeding are applicants for CATV franchises in Philadelphia. The comments of Columbia Broadcasting System (CBS) refer to applications for CATV franchises in Albany and Syracuse, N.Y.; Galveston, Tex.; and the grant of a CATV franchise in Wilmington, Del. D. H. Overmyer, permittee of new UHF station WDHO–TV in Toledo, Ohio, comments that local authorities have granted a CATV franchise for that city since the issuance of the joint notice herein. Toledo has two VHF stations, a UHF educational station, and—according to Storer Broadcasting Co., receives the signals of four Detroit-Windsor VHF stations, off the air and without reception difficulty. Telerama, Inc., an applicant for a CATV franchise in Cleveland, has filed comments describing

[22] The tables use potential, rather than actual audience, i.e., the total number of households within the broadcast contour, and the total number of households in the community of the CATV.

[23] Address by Milton J. Schapp, "CATV—Past, Present, Future," Dec. 8, 1964, reprinted in Television Digest special supplement, vol. 4, No. 50, Dec. 14, 1964, p. 1.

its proposed cable operation for that city which has three VHF stations, a UHF educational station, and applications pending for two new UHF facilities.[24] Taft Broadcasting Co., in a June 1965 petition to deny a microwave application (file No. 6226–C1–P–65) to bring the three New York independent stations to CATV systems in the Wilkes-Barre-Scranton area of Pennsylvania, states that in the last 6 months 90 franchise applications have been filed in 54 communities in Lackawanna and Luzerne Counties. The Scranton-Wilkes-Barre area is served by three UHF stations, providing three full network services.

39. The most factually detailed comments on big city CATV were submitted by Midwest Television, Inc., licensee of station KFMB–TV in San Diego, Calif. According to Midwest, CATV is growing with great speed in the San Diego area, which is presently served by three VHF stations providing the programs of all three networks.[25] In addition, construction permits are outstanding for two new commercial UHF stations in San Diego and an application is pending for a UHF educational station. Since March 1963, when the first CATV system in the area was franchised, seven additional systems have been franchised. All eight CATV systems are within the grade A contour of KFMB–TV, which falls within the Metropolitan San Diego area; four are located in San Diego itself. While four of the eight systems are not yet operative, two of these are expected to begin operations momentarily. The operating CATV systems, which do not use microwave, carry the signals of all seven Los Angeles commercial VHF stations and carry the local stations without affording nonduplication protection. Midwest has been unable to obtain the current subscriber count, estimated at approximately 10,000 homes in February 1965.[26] However, its engineering personnel recently counted drops in a part of San Diego where CATV had been available for only 3 months. Of the 159 homes in that area, 58 were wired for CATV—and this, Midwest points out, "is an area where all three stations can be satisfactorily received" (Midwest comments, p. 24).

40. The Midwest comments also describe what it considers to be the effect CATV operations of this nature have on the audience of the local network-affiliated stations. Southwest Surveys, an independent research organization, conducted a survey for Midwest in June 1965, interviewing 300 CATV subscribers and 300 nonsubscribers in the San Diego area. Forty-three percent of the CATV subscribers had been subscribers for less than 3 months. Midwest states (comments, p. 9) that during the prime evening hours of 7:30 p.m. to 11 p.m., when most of the programs broadcast by the three San Diego area stations were network programs, the San Diego area stations accounted for 88

[24] Telerama plans to carry all local stations and two Canadian stations on a full-time basis and to carry on a part-time basis on the remaining channels the signals of network affiliated stations in Detroit, Toledo, Erie (Pa.), and Youngstown and Akron, Ohio. While it does not propose to acquire microwave facilities to bring in Chicago and New York independent stations, Telerama states that if these signals are made available to the Cleveland area by common carrier facilities, "then Telerama may avail itself of the accessibility to such signals." Since Telerama submitted its comments, Cleveland has granted a franchise to Telerama.

[25] Midwest's station KFMB–TV is a CBS affiliate, KOGO (San Diego) is an NBC affiliate, and the third station, XETV (located in Tijuana, Mexico, just a few miles from San Diego), is an ABC affiliate.

[26] San Diego Telecasters, Inc., permittee of UHF station KAAR–TV in San Diego, estimated as of Aug. 25, 1965, that there are "more than 15,000 sets now served by cable."

and 97 percent of the total viewing time of non-CATV subscribers interviewed in two different areas and only 62 percent among cable subscribers. During the hour from 9 p.m. to 10 p.m., Sunday through Wednesday, when each program broadcast by each of the San Diego area stations was simultaneously duplicated on CATV by Los Angeles stations, 93 percent of the nonsubscribers saw them on local stations whereas only 77 percent of the cable subscribers did so (pp. 9–10). Of the cable subscribers, 49 percent reported that they viewed a San Diego channel most; 55 percent named a Los Angeles channel. Of the nonsubscribers in two separate areas, San Diego stations were named by 108 and 94 percent, respectively, while Los Angeles stations were named by only 5 and 11 percent (id., p. 25).[27]

41. With respect to nonnetwork viewers, Midwest states that 25 percent of the CATV subscribers named a Los Angeles independent station as the channel they viewed most and only 1 and 2 percent, respectively, of the two groups of nonsubscribers did so. More than 56 percent of the CATV subscribers (as compared to 11 percent of the nonsubscribers) named at least one Los Angeles independent as one of the three stations most viewed (id., p. 26). During the period 5 p.m. to 6 p.m., Monday through Friday, there was no duplication by any Los Angeles station of programs broadcast in San Diego and the cable subscriber could watch any one of 10 different programs. Among nonsubscribers interviewed, 95 percent of those who watched television during that hour watched one of the San Diego stations. Among cable subscribers the Los Angeles stations accounted for 52 percent and the San Diego stations 48 percent (id., pp. 26–27).

42. Moreover, appended to the comments of Columbia Broadcasting System (CBS), which is opposed to an assertion of jurisdiction, is a further study of CATV prepared by its office of economic analysis. The CBS study points out that there is a timespan lag before CATV impact is felt (CBS comments, exhibit A, p. 27). This is partly because CATV penetration does not occur all at once; growth is gradual. But CBS also states that networks react slowly to changes in station audiences and that it might take 3 to 5 years for a change in an affiliate's audience to be reflected fully in the relative network rate. National spot revenues and local advertising, while reacting more quickly, would still take a considerable time. The study concludes (p. 31) that the "true reasons for the modest impact of CATV thus far are the relatively small amount of penetration that CATVs generally have in any particular market and the considerable length of time necessary for the effects of CATV to work themselves out." [28]

43. Like the Seiden report, the CBS study bases its discussion of CATV potential and impact on CATV systems operating or franchised as of August 1964. It concludes, therefore, that CATV potential is limited to communities more than 40 miles from three stations providing the service of the three networks (plus some metropolitan

[27] Percentages total more than 100 percent because some multiple answers were given.
[28] AMST argues that this timelag is not as great as CBS asserts. It states (reply comments, p. 22): "However long before an affiliate's network rate card is affected, advertisers will inevitably drop from network orders those stations which show serious audience losses, whether from CATV or any other cause. That this is the likely sequence is demonstrated by the parallel situation—network radio, which felt the impact of television by sharp decreases in station orders long before those stations' network rates were affected."

area apartment-house dwellers), an estimated 6–8 million TV homes. However, the study recognizes (p. 14) that CATV "systems are clearly moving closer to transmitting points" and states further (pp. 16–17):

> There is a final caveat that must be made at this point. There has been in the very recent past, and not included in the systems in our study, a group of applications for CATV systems in communities with three more than adequate network services which do not appear to be related to apartment-house reception problems. Thus, applications for franchises have been made in places like Albany, Syracuse, Galveston, Philadelphia, and Cleveland, and a franchise has just been granted in Wilmington, Del. * * * While these do provide alternative programing, we do not know as yet whether this added factor will be sufficient to make the systems viable. If these systems are established and thrive, it is clear that the potential for community antenna systems far exceeds anything that we have talked about thus far and, in fact, much of the country could ultimately become CATV territory."

44. In view of the rapidly changing circumstances outlined above, we can see no point in conducting a further factfinding inquiry with respect to nonmicrowave CATV as it has existed in the past. The extensive studies conducted by Dr. Fisher, Dr. Seiden, and NCTA in conjunction with dockets Nos. 14895 and 15233,[29] and further studies of CBS and AMST in this proceeding, all concerned nonmicrowave as well as microwave CATV systems. Studies of this nature are out of date almost before we have had time to consider them. Moreover, they are of limited value since they cannot measure some of the most important factors we are bound to consider. These include the cumulative future effect of greater penetration by CATV systems franchised or applied for but not yet in operation, the degree of success to be achieved by CATV systems in big cities or other well-served areas, and the effect of the burgeoning CATV activity—if left unregulated—on the decisions of potential applicants and existing licensees as to whether to inaugurate or improve service.[30]

45. What we said in the first report and order in rejecting NCTA's argument that regulatory action should not be taken in the absence of a showing that stations have ceased operation, or are about to cease operation, applies with equal force to its renewal of that argument here.[31] We stated (par. 77):

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[29] See, e.g., pars. 20 and 32 of the first report and order in dockets Nos. 14895 and 15233, and p. 49 of the Seiden report.

[30] The CBS study further asserts (pp. 27–30) that the effects of a rise in CATV penetration with its depressing effect on station revenues are offset in large degree by the persistent rise in advertising demand for television time. However, as AMST points out, the number of stations sharing the advertising demand is also increasing as new UHF stations stimulated by the all-channel law commence operations. Moreover, annual broadcast expenses are on the average increasing apace with revenues.

[31] While the distant signal procedure adopted in pt. II will probably have some effect on the trends we have been here discussing, we think that application of the carriage and nonduplication requirements to all systems is still required in the public interest. First, not only will this end the present unwarranted discrimination between the microwave and nonmicrowave system, but it is called for on the basis of the fair competition ground, discussed in pars. 26–27. Second, as to the economic-impact ground we note that in view of recent growth, there are a very substantial number of CATV systems operating on the date of release of this report with the capacity to keep growing to perhaps 50–70 percent of the television homes in their communities, and thus to have a cumulative effect in areas such as those noted in the prior discussion (e.g., pars. 35–37). New systems will continue to come into operation under the interim procedure, and it may be important that the cumulative effect of such systems, after growth to significant figures, be ameliorated to some extent by the carriage and nonduplication requirement. Most important, the distant-signal procedure is of interim nature, subject to discontinuation or revision. See par. 150. The carriage and nonduplication rules which we adopt here are not interim—they are our best judgment of what the public interest calls for over an indefinite period.

NCTA's argument that CATV has not yet caused any widespread demise of existing stations misses the point. As we have pointed out above, it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. Further, it is difficult, if not impossible, to attempt to delineate with any precision a factor such as discouragement of entry of potential broadcasters because of CATV competition. In short, we must plan now for the healthy coexistence of CATV and local stations and safeguard the public from future injury. Circumstances have changed since our 1959 report and order, and the likelihood or probability of adverse impact upon potential and existing service has become too substantial to be dismissed. If studies are in conflict and present a close question as to the precise extent of the impact, it is not close as to how this uncertainty should be resolved. This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved in favor of insuring the healthy growth and maintenance of the basic service.

46. In sum, we have concluded in the first report and order in dockets Nos. 14895 and 15233 that the public interest requires that CATV systems carry local stations without duplication for a reasonable period, in order to avoid unfair competitive disadvantage to and prejudicial effect on existing and potential broadcast service. We have concluded herein that we have authority under the present provisions of the Communications Act to extend these requirements to nonmicrowave systems. In view of the rapid surge in CATV growth since this proceeding was initiated, we think that our statutory obligations require us to act now in the areas we have proposed. This will end the present unwarranted distinction between microwave and nonmicrowave systems, and will enable us to make the rules effective before operations are commenced by a large number of CATV proposals presently in the franchise or application stage.

C. Substantive Provisions of the Rules

47. CATV systems, as we recognized in the first report (pars. 43, 48) and here again emphasize, have arisen in response to public need and demand for improved television service and perform valuable public services in this respect. CATV (like other auxiliary television services) makes possible the provision of a variety of program choices, particularly the three full network services, to many persons in areas with no local station and in one- and two-station markets. CATV systems also afford a means of providing nonnetwork commercial and educational services to many persons in areas with insufficient population to support local broadcast outlets of this nature. CATV systems make important contributions by providing good quality reception of color signals and improving reception of local signals in areas within the predicted contours of local stations where off-the-air reception is inferior or precluded because of terrain, manmade structures, or other factors. We do not intend to deprive the public of these important benefits or to restrict the enriched programing selec-

tion which CATV makes available. Rather, our goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303(g) of the act), both those who are cable viewers and those dependent on off-the-air service. The new rules discussed below are the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service.

48. To insure effective integration of CATV within a fully developed television service, the new regulations will apply equally to all CATV systems, including those which require microwave licenses and those which receive their signals off the air.[32] We have carefully reexamined the CATV rules currently in effect for microwave-fed systems, and have made some changes. The microwave rules will be revised to reflect the new rules adopted for all systems.

49. In brief, under the new rules, a CATV system will be required, upon request and within the limits of its channel capacity, to carry without material degradation the signals of all local television stations within whose grade B contours the CATV system is located, in order of priority of signal grade. A CATV system will be required, upon request, to avoid duplication of the programs of local television stations carried on the system during the same day that such programs are broadcast by the local stations. This nonduplication protection, as under the existing rules, will apply to "prime time" network programs (i.e., presented by the network between 6 and 11 p.m., eastern time) only if such programs are presented by the local station entirely within what is locally considered to be "prime time." Nonduplication protection will not be afforded to programs which are carried in black and white by the local station and are available in color from a more distant station on the CATV system. Ad hoc consideration will be given to petitions from local television stations seeking a greater degree of protection than provided by the rules, or from CATV operators seeking a waiver of the rules, and we are adopting procedures to facilitate such petitions. Moreover, the Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules.[33]

50. Thus, the carriage requirements made applicable to all CATV systems will be substantially the same as those applied to microwave-served systems by the Commission's first report, except in certain minor respects discussed in paragraphs 74 and 83 below. However, the new nonduplication rules embody two substantial changes from those adopted in the first report. First, the time period during which nonduplication protection must be afforded has been reduced from 15 days before and after local broadcast to the single day of the local broadcast. Second, a new exemption from the nonduplication require-

[32] Excluded from these rules will be those CATV systems which serve less than 50 subscribers, or which serve only as an apartment-house master antenna.

[33] Private agreements will not avoid the necessity for evidentiary hearing for the importation of distant signals into the top 100 markets (pt. II, below), though such agreements will be considered in our decision.

ment has been added as to color programs not carried in color by local stations. We shall discuss the nonduplication changes first because they are of a major nature.

1. The nonduplication provisions

51. *Modification of the nonduplication period.*—Nonduplication at the same time that a local broadcast is being carried on the cable is clearly called for in the public interest for the reasons discussed above and in the first report. Simultaneous nonduplication protects the bulk of the popular network programing of most network affiliates and does not affect the time that such programing is available to the CATV subscriber. In the first report we further determined that some measure of protection beyond simultaneous nonduplication would also serve the public interest on a number of grounds. We shall not repeat here the reasons set forth in the first report for that determination or for the further judgment that a 15-day before-and-after period was appropriate.

52. We have reconsidered the latter judgment and have decided to strike a different balance in light of the fact that the rules are now being made applicable to a large number of existing systems and will affect their existing service to the CATV viewing public. The systems which will now operate under the rules for the first time constitute the great bulk of the CATV industry. In addition to all nonmicrowave systems, they include a sizable number of microwave CATVs served pursuant to authorizations granted prior to December 1963 when the interim condition procedure began. We recognize that the imposition of a 15-day before-and-after nonduplication requirement on systems which have not previously operated in this manner would tend to substantially disrupt the viewing habits of the CATV subscribers. As NCTA points out (NCTA comments, exhibit B, pp. 35–38), there is no question but that large numbers of CATV subscribers have become accustomed to viewing network programs at the time they are presented by the distant affiliates. Although 15-day before-and-after nonduplication was not required where timeliness was important, and all distant city programs deleted under the rules would have been available to the CATV subscriber via the local signal at some time within the total 30-day period, the CATV viewer might not be able to view it on the later date of presentation by the local station for any number of personal reasons.

53. We believe it desirable to avoid disruption to the established viewing habits of the public as much as possible. Moreover, we are seeking to preserve, to the extent practicable, the valuable public contribution of CATV in providing wider access to nationwide programming and a wider selection of programs on any particular day. Balancing all the pertinent considerations, we think that the nonduplication period should be reduced to the same day for existing systems. Not only will this eliminate the great bulk of delayed nonduplication requests (see par. 125, first report), but it will insure that the program is available to the CATV audience that same day and, in the case of network prime-time programs, that same evening. While not wholly eliminating any possible change in viewing time on the pertinent day, this revision clearly minimizes any disruptive effect on

the CATV viewer. As an incidental benefit, we note that same-day nonduplication will substantially reduce the areas of possible dispute between broadcasters and CATVs in complying with the rules, and to this extent will facilitate ease of administration.

54. Application of a 15-day before-and-after nonduplication provision to new systems would not, of course, cause a similar disruption to established viewing habits, since the CATV subscriber would from the beginning receive service in accordance with the rules. It would be possible to "grandfather" existing systems on a same-day nonduplication basis and make 15-day nonduplication effective only as to new systems. But there are a number of countervailing arguments. First, even in the case of the new system, there is disruptive effect to the extent that the CATV subscriber may not be able to view programs from distant stations at the times specified in his TV guide (and may be unable to view them at the later date presented by the local station for any number of reasons). It is our understanding that it is essentially for that reason that some broadcasters, although previously entitled under our microwave rules to 15-day before-and-after nonduplication protection, have requested only simultaneous nonduplication. Second, it is obviously preferable to have one set of rules for all systems and thus to avoid the anomalous situation of millions of CATV subscribers viewing under one set of rules and other millions, often neighbors in close-by communities, subjected to a different set. Under the circumstances, we think it better to provide by rule for same-day nonduplication for all systems, and to safeguard the public interest in the particular instance warranting different treatment pursuant to the ad hoc procedures discussed in paragraph 97 below.

55. We also considered the question of retaining the 15-day before-and-after nonduplication provision for nonnetwork programing. But, as we have previously recognized, and indeed stress in this report (pars. 123, 131, infra), 15-day before-and-after nonduplication affords, at best, only minimal protection with respect to the presentation by local stations of syndicated and film programing. Such programing is not presented on a nationwide simultaneous or even nearly simultaneous basis. Retention of the 15-day provision for nonnetwork programs alone would serve little effective purpose. Stated differently, the adoption of a uniform "same day" rule will not, in our judgment, significantly affect the protection afforded as to nonnetwork or independent programing. Rather, we have determined that we must look elsewhere if we are to achieve effective relief in this respect. We treat the situation of the independent station in part II below.[34] As a general approach encompassing all stations, we are proposing to the Congress that it consider the question of extending the rebroadcast concept of section 325(a) to CATV. It may be that regulation of this nature would prove a preferable and more effective means of achieving fair recognition of the exclusivity contracts of the program marketplace. Here again, we shall consider requests seeking more extensive protection of nonnetwork programing on an ad hoc basis to

[34] With "same day" nonduplication affording substantial protection to the most popular network programing, most network affiliated stations should be viable.

insure that the public interest is not prejudiced in the unusual situation (although, as stated, we are unaware of any instance where the 15-day period afforded effective relief in this respect).

56. While conflicting considerations are presented, we believe that our resolution constitutes a fair compromise. First, same-day nonduplication is clearly sufficient to take care of the time zone differential problem, i.e., to preclude a CATV system, which brings programs across either border of the mountain time zone, from duplicating most, if not all, of a local station's network programs an hour or two before or after they are presented locally. Moreover, it will afford the station affiliated with more than one network some leeway in presenting what it regards as the most attractive programs of each for the benefit of the non-CATV audience (and also, the CATV audience—see par. 115, first report) so long as such programs are presented on the same day as the network presentation and prime-time programs are broadcast entirely within prime-time hours.[35] This will, as stated, minimize any disruption to the CATV subscribers. In addition, we will consider requests by local stations and CATV systems for different treatment on an ad hoc basis, pursuant to the summary procedures discussed in paragraph 97, where possible, or by evidentiary hearing if necessary. Thus, the station which receives its network programing by mail, or the station or system which faces some other unusual problem, can bring its situation to our attention for such relief as may be appropriate in the individual circumstances and warranted by the public interest. Similarly, the CATV system can seek a waiver of the rules. We stress, in addition, that the Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules. We believe that the above resolution fairly serves the public interest. If further revisions are needed on the basis of our experience with these new provisions, we shall of course move promptly to implement such revisions.

57. Our decision to adopt same-day nonduplication makes appropriate some other revisions in the exclusivity sections of the rules. First, however, we stress those provisions which remain unchanged. We shall retain the provision requiring the local station to present prime-time network programing entirely within prime-time hours in order to be entitled to nonduplication.[36] Thus, the CATV system

[35] In this connection, we note that the amount of delayed network broadcasting in the median one- or two-station markets is about 5½ and 11 hours per week, respectively. See par. 108, first report. While this amount is not insignificant and we recognize that there will be some detriment to the public if the local station in the median market curtails delayed broadcasts because of the absence of nonduplication protection, we point out that the amount of delayed broadcasts is not of too large a nature in the median market, and that we would not expect the local station to cease all delayed broadcasts in the absence of delayed nonduplication protection. Moreover, the pending liberalization of our translator policies may result in greater availability of off-the-air service in one- and two-station markets.

[36] AMST has requested elimination of the exception for prime-time programs broadcast outside of prime-time hours. AMST urges that this provision is unnecessary because it is normally in the best interests of the station to carry prime-time programs in prime hours and the Commission has ample power to remedy any abuse. It is further asserted that there may be instances where a station reasonably desires, and has network consent, to carry such programs at other hours. However, a prior CATV presentation does not preclude the station from repeating the program outside of prime time if it has good reason to do so, and it is unlikely that instances of this nature would arise often enough to make the loss of exclusivity a significant problem. Since the provision is designed to insure that CATV subscribers have prime-time programs conveniently available in the hours of maximum viewing, the public interest is best served by its retention.

need not delete reception of any network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but which is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for the network programing in the time zone involved. This will insure that such programs are available to the CATV subscribers in maximum viewing hours. We shall also retain the provision that the CATV system need not delete reception of any program as to which time of presentation is of special significance, such as a speech or sporting event, except where the program is being simultaneously broadcast by the local station. And, although it is of greatly reduced significance for same-day nonduplication, we shall retain the provision that the CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusively is being protected pursuant to the requirements of the rules).

58. However, there no longer appears to be any real necessity for the provisos to sections 21.712(g), 74.1033(e), and 91.559(e), i.e., that:

> (1) The system is not required to maintain the exclusivity of the network programing of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which substantially duplicates the network programing of the station requesting exclusivity; and
>
> (2) The system is not required to maintain the exclusivity of the nonnetwork programing of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which operates in what are normally and usually considered other markets for purposes of television program distribution.

These provisions were grounded in the 15-day before-and-after nonduplication period which protected network programs delayed substantially beyond the date of network presentation and protected nonnetwork programs for a total of 30 days. In view of same-day nonduplication, we shall provide simply that higher priority signals carried on the system are entitled to exclusivity against lower priority or more distant signals but not against signals of equal priority.[37]

59. *Color duplication.*—In the first report and order in dockets Nos. 14895 and 15233 we decided that the public interest would be served by some accommodation which would permit a CATV system to duplicate the programs of a local station in color where the station transmits only in black and white (par. 143). However, we did not there determine whether such an exception should apply across the board or whether the CATV system should be required to make a threshold showing that a certain number or percentage of its subscribers possess color receiving sets. Comment on this question was invited in this proceeding.

60. Most of the comments, from broadcast and CATV interests alike, favor permitting color duplication on an across-the-board basis.

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[37] Though these modifications stem from our action in shortening the nonduplication period, we note that changes of this nature were requested by AMST and ABC under the 15-day before-and-after nonduplication period.

No one has supported the proposed alternative of requiring a threshold showing by the CATV system. It is urged that it is in the public interest for color programing to be available to as many persons as possible, and that this should be encouraged by the Commission pursuant to section 303(g) of the act. The few comments opposed to making an exception for color claim that it is unnecessary. They assert that most stations not already equipped to present network programs in color will acquire such equipment now that all of the networks have commenced a significant degree of color transmission. It is further asserted that the exception would penalize smaller stations lacking financial resources to convert to color.

61. In light of the comments, we have decided to permit color duplication of local black and white transmissions without requiring any threshold showing by the CATV system. It may be that most stations will shortly be equipped to present network programs in color. But in that event the broadcasters have no real cause for complaint in the adoption of a provision which will not adversely affect them. We think that the exception is in the direction of encouraging the wider distribution of color programing and that it is consistent with the supplementary role of CATV. Any local station finding itself at a significant disadvantage can install equipment for the transmission of network color programs "at relatively little expense" (comments of American Broadcasting Co.), which would benefit its non-CATV viewing public. Hardship situations may be brought to the Commission for such relief as may be warranted by the station's showing. Accordingly, the rules governing microwave-served CATVs will be amended in this respect and the exception will be incorporated in the rules adopted for all systems. The exception will also apply where a local station is equipped for simultaneous color transmission of network programs, but delays a color program for later presentation on the same day by means of black and white video tapes.

62. Some of the CATV comments urge us to go further and permit duplication of local colorcasts where a CATV system makes a showing that the technical quality of the local signal is substantially inferior to another signal. While we would, of course, consider any such showing on a case-by-case basis, we have no reason to anticipate any widespread problem warranting action by rule. We expect that valid complaints of this nature will be rare. In most instances the technical quality of the local signal should be sufficiently good to permit satisfactory color reception on the cable if the CATV system and the station cooperate in good faith to accomplish this result. We would expect good-faith efforts by both to resolve any technical problem before any complaint is made to the Commission.

63. *Other changes in the nonduplication provisions suggested by the parties.*—The comments of NCTA (exhibit B, pp. 35–38) assert that last minute program changes by the local station require the CATV operator to bear the labor costs of a manually controlled switching device or to punch a new tape for the remainder of the week where an automatic switch is used. While this assertion was made in the context of the delayed nonduplication provision, we think that the broadcaster should afford the CATV sufficient advance notice of non-

duplication requests to permit the CATV system to make its program schedule available to subscribers and to set an automatic switching device only once for the entire week.' Accordingly, we shall amend section 21.712(h), 74.1033(f), and 91.559(f) to require that the station, upon request of the CATV operator, shall give notice under these sections at least 8 days prior to the broadcast to be deleted. Since same-day nonduplication affects principally network programs, which are ordinarily presented at the same time each week during the network season, this amendment should pose no difficulty for the station.[38] Indeed, in most instances it would appear that such notice could be given at the start of the network season and continued in effect until further notice occasioned by changes in the schedule of the network or the local station.

64. AMST urges that the rules be modified to provide nonduplication protection to local stations which are not carried on the cable—either because no request has been made or because of the limited channel capacity of the system. It states that carriage has no essential relationship to nonduplication and should not be a condition of the latter. We cannot agree. If nonduplication were afforded where the local station is not carried, the CATV subscriber would, in some instances, be greatly inconvenienced and, much more important, in others be deprived of all opportunity to view the programs involved. See paragraph 51, first report. This is not the purpose or effect of the rules as written, nor would it serve the public interest. As set forth in paragraph 68 below, the better procedure where the system's channel capacity is too limited to permit full carriage of the local station is to substitute its programs for the duplicating outside signal. Partial carriage would retain the availability of the programs to CATV subscribers and at the same time afford the station some measure of protection.

65. Other changes in the nonduplication provisions requested by AMST and ABC have been rendered moot by our action in shortening the nonduplication period to 1 day and the modifications we have made in that connection. Accordingly, we shall not discuss their contentions in this respect. The comments with respect to nonduplication of noncommercial educational stations are discussed in a separate section on educational television (sec. 4 below).

2. The carriage provisions

66. We shall, as stated, apply to all CATV systems substantially the same carriage requirements as were adopted for microwave-served systems in the first report.[39] Thus, within the limits of its channel capacity, a CATV system will be required to carry the signals of all commercial and educational television stations within whose grade B contour the system is located, giving priority: First, to principal community signals; second, to grade A signals; and third, to grade B signals. The CATV system need not carry the signal of any station,

[38] It has come to our attention that the requesting station may have difficulty in giving notice where the CATV does not always carry the same signals. Where a CATV system varies the signals carried, it should provide the local stations with a copy of the CATV schedule in sufficient time to permit the station to give notice of the programs to be deleted.

[39] There are, however, changes stemming from our resolution of the translator question (sec. 3 below).

if (1) that station's network programing is substantially duplicated by one or more stations of higher priority, and (2) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station. Moreover, in cases where (1) there are two or more signals of equal priority which substantially duplicate each other, and (2) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations. Where a signal is required to be carried, it shall be carried without material degradation in quality, and shall be carried in full except to the extent that nonduplication of higher priority signals may be required under the rules. Upon request of the local station, the signal shall be carried on the system on the channel on which the station is transmitting (where practicable without material degradation) and on no more than one channel. Where a system is not carrying the signal of a grade B or higher priority station, it shall offer and maintain for each subscriber a switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber indicates in writing that he does not desire this device.

67. *Modifications requested by the parties.*—Some of the parties have requested changes in these provisions. Thus, NCTA urges that CATV subscribers see no reason why out-of-State stations should be regarded as local. It asserts that CATV systems should have the option to carry more distant signals originating within the same State in preference to out-of-State stations placing a grade B signal over the community. We agree that there may well be instances where the programing of stations located within the State would be of greater interest than those of nearer, but out-of-State stations—e.g., coverage of political elections and other public affairs of statewide concern. We recognize also that there may be instances where out-of-State stations located in another State are of greater community interest than the geographically nearer out-of-State stations because of closer community ties with the third State. Considerations of this nature will be accorded substantial weight as a basis for waiver of the carriage provisions.

68. In this connection, we emphasize that we intend to make every effort, consistent with the public interest, to avoid disrupting existing service to the public in applying the carriage provisions of the rules to systems now in operation.[40] Where, because of limited channel capacity, a CATV system cannot carry all grade B signals without dropping a more distant signal now being carried, we shall entertain a request for waiver of the rules pursuant to the summary procedures discussed in paragraph 97 below and upon the basis of the showing specified in paragraphs 104, 106. In appropriate circumstances, waiv-

[40] As in the case of our present policy with respect to microwave systems, carriage will not be required where a sufficient showing is made that a predicted signal is not in fact present in the community, or that a good signal is not obtainable because of technical deficiencies on the part of the station.

ers will be granted, which will permit the system to continue to carry the distant signal and to substitute the nearer signal only where simultaneous duplication would occur. Thus, upon such waivers the CATV viewers would continue to receive all programs to which they were accustomed, via the more distant signal when the programs are different and via the local signal when the programs are the same. New systems can commence operation with a channel capacity sufficient to carry both the local and the distant signals; indeed, most new systems now commence operation with 12-channel capacity.

69. Section 21.712(f)(2), section 74.1033(d)(2), and section 91.559(d)(2) presently provide that where a signal is required to be carried, it "shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation)." WJAC, Inc., and WKBH Television, Inc., urge that carriage on channel should be a matter for the station's choice. According to WJAC, the station should be entitled both to insist that its signal be carried on another channel, and to select the channel of a lower priority or nonlocal station. AMST claims, on the other hand, that carriage on channel is extremely important and should be mandatory unless the CATV makes a compelling showing that this is not technically feasible without degradation. It states that the CATV should be required to take all reasonable steps to eliminate material degradation which may result from the CATV equipment used or inadequate installation.

70. Since sections 21.712(f)(1), 74.1033(d)(1), and 91.559(d)(1) already provide that the "signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art)," we do not think that any change in subsection (2) is called for. The requirement for onchannel carriage is only operative upon request of the station licensee or permittee. If this results in material degradation, the station can request carriage on another channel. Moreover, if the channel capacity of the system is such that some signal must suffer material degradation, the inferior signal obviously should not be that of a higher priority station. First report and order in dockets Nos. 14895 and 15233, paragraph 135. However, no reason appears why it is necessary for the station itself to select the alternative channel. So long as the requirements of the rules are met, the CATV operator should be free to decide how the channels on its cable are to be utilized.

71. AMST further asserts that the CATV system should not have complete discretion under sections 21.712(d)(2), 74.1033(b)(2), and 91.559(b)(2) to select among substantially duplicating signals of equal grade where noncarriage of one or more is necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations. It urges that the rule should be modified to set forth reasonable standards for selection, such as the respective distances of the stations from the community, relative signal strength, respective audiences in the community—as measured by audience surveys, terrain considerations, and the like. We recognized in the first report and order in Dockets Nos. 14895 and 15233, paragraph 91, that leaving the selection to the CATV's discretion makes possible "dis-

crimination between local signals in some instances." We further stated that we would closely examine complaints of abuse, particularly where the CATV operator has an ownership or other interest in one of the duplicating channels. We shall also give particular consideration to any allegation that the station not carried is one with closer community ties. The criteria suggested by AMST would not do away with the necessity for case-by-case resolution of complaints. AMST concedes (comments, p. 20) that any criteria for determining priority should not be inflexible and that an opportunity should still be provided for the submission of other data to the Commission. In the circumstances, it seems preferable to retain the rule in its present form until experience in its administration demonstrates what refinements might be needed or appropriate.

72. AMST also claims that exclusion of nearby network-affiliated stations in order to bring in distant independent stations which do not place a grade B signal over the community of the CATV, should not be permitted since "this would drastically affect the normal off-the-air competitive pattern of television service" (AMST comments, pp. 20–21). This provision is admittedly a "compromise approach," recognizing both that a CATV system owes its primary duty to the stations that are closest and place the best signal over its community, and also that carriage of nonnetwork signals may contribute to the diversity of its service (first report and order in dockets Nos. 14895 and 15233, par. 89). The general questions of whether there should be some limit on the distance and number of nonlocal signals brought in, as well as the matter of "leapfrogging," are being considered in part II of this proceeding. Pending resolution of these matters, we shall retain the rule in its present form.

73. Next, AMST asserts that the installation of a switching device should be mandatory in all cases, whether or not the local signal is carried, so that the subscriber will not be foreclosed from off-the-air service where the cable system is inoperative or not operating properly. It is further urged that no exception should be made when the subscriber indicates in writing that he does not desire a switch, since the requirement could easily be avoided by a "small-print" waiver in the subscription contract. While these suggestions may have some merit, we do not think they warrant a revision of the rules. The rules are designed to protect local stations in areas which are crucial and essential to preserve and encourage service to the public. For the reasons stated in paragraph 51 of the first report, particularly that going to "sheer inconvenience of switching * * *," we do not view this area as one of great significance, requiring further revision.

74. A further change suggested by AMST does, however, appear to warrant modification of the rules. Sections 21.712(d)(3), 74.1033(b)(3), and 91.559(b)(3) now provide that where a CATV system operates within the grade B or higher priority contour of both a satellite station and its parent, carriage of one will relieve the system of any obligation to carry the other. AMST points out that this would allow a CATV system in, or very near to, the same community as the satellite to carry only the parent station, causing the satellite to lose audience for which it may be originating some local programing

and reducing its incentive to originate programs. It urges that satellites should be treated like any other station in accordance with the prescribed priorities. Since satellites operate on assigned channels and possess the potential to develop into regular stations, there is a strong public interest in encouraging them to do so. Accordingly, sections 21.712 (d)(3) and (g)(3), 74.1033 (b)(3) and (e)(3), and 91.559 (b)(3) and (e)(3), together with the note to those sections, will be deleted.

75. And, finally,[41] AMST suggests that CATVs be required to refrain from deleting or altering any portion (including advertising) of signals carried pursuant to the rules. Such a requirement is implicit in the carriage provisions and we would so rule upon complaint. The addition of an explicit provision does not appear necessary in the absence of some evidence of abuse. In this connection, we note that it is asserted in the comments of NCTA that some broadcasters who have requested systems to refrain from advance duplication of delayed broadcasts have later presented only a portion of the program. Since the CATV system is relying exclusively upon the signal of the local station to bring the program to its subscribers, the station has an obligation to present in full any program for which nonduplication is requested. Again, upon complaint we would rule accordingly. See also paragraph 158, first report. Moreover, same-day nonduplication will greatly reduce the likelihood of any incidents of this nature.

76. Accordingly, apart from the provisions relating to satellites and the changes occasioned by our disposition of the translator questions (sec. 3 below), the carriage requirements of the new rules will be the same as the provisions now governing microwave-served systems.

3. Translators

77. Part I of the notice in this proceeding (par. 36) requested comments on two questions concerning translators: (1) Whether CATVs should be required to carry and not duplicate the signals of station-owned translators operating beyond the parent station's grade B contour,[42] and (2) whether translators should themselves be precluded from duplicating the programs of local stations.

78. With respect to the first question, the parties have expressed diverse views. The CATV interests and some of the broadcasters argue against extending any protection to translators outside the grade B contour because such translators are operating outside the normal service area of the parent station, do not provide a local service or possess the potential for developing into regular local stations, and are relatively inexpensive to construct and operate. It is further asserted

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[41] AMST also asks that the definition of substantially duplicating network programing (secs. 21.710(f), 74.1001(e)(6) and 91.557(f)) be modified to apply only to a situation where two or more stations are primary affiliates of the same network. While such a definition might have been equally acceptable as an original matter, we do not think that any difference between the two is significant enough to warrant redoing the rules at this point. An additional proposal of AMST that the substantially duplicated concept be retained only for purposes of carriage has in effect been granted in view of the matters discussed in par. 58 above.

[42] Under the rules adopted in dockets Nos. 14895 and 15233, station-owned translators located within the grade B contour are treated as extensions of the originating station (secs. 21.710(b), 74.1001(e)(2), and 91.557(b)). Such translators will be treated the same under the new rules.

that translators should not be protected because they may impede the establishment of local stations.

79. AMST, Storer Broadcasting Co., NAEB, and the Farm Bureau urge, on the other hand, that all translators (including those not station owned) should be carried in order to provide an incentive for the establishment of translators. Translators, they claim, should be encouraged because their service is received off the air free and covers a wider area than cable service. They would exempt translators from the carriage requirement where: (1) The CATV system is carrying the translator's parent station, (2) the CATV system is within the grade B contour of a station whose programing is substantially duplicated by the translator, or (3) the translator is supplying programing which substantially duplicates that of another translator whose originating station is closer. Nonduplication protection is not sought for the asserted reason that translators do not provide a local service or possess potential for developing into regular local stations.

80. We share the view that the public interest is served by encouraging expanded use of translators to bring television service to persons in rural areas and communities not now receiving adequate local television broadcast service. Apart from the fact that translator signals are received free and reach persons outside the urbanized areas served by CATVs, one of the major recommendations of the Seiden report was that increased consideration be given to the expanded use of translators. The report states (p. 22):

> Consideration should be given to the use of translators as a tool of structural policy. They require a substantially smaller investment than CATV and are compact, highly mobile, and can be sold in the secondary market. In general they provide the flexibility necessary in an industry in which structural policy must be kept free to adapt to technological and demographic change. Translators are ideally suited as a temporary communications medium, and their use should be required of broadcast licensees in fulfilling their obligations to the public by bringing their signal to all homes in their coverage area.

The report also recommends increased use of translators to broaden the coverage of UHF stations (p. 90).

81. We have already taken a step in this direction in the report and order in docket No. 15858, issued on July 9, 1965, amending the rules to permit 100-w VHF translators on any channel listed in the Table of Assignments unoccupied by a regular television station or satellite. The rules were also amended to permit 100-w UHF translators on all unoccupied UHF channels in the Table of Assignments in lieu of the previous limitation to the upper 14 channels. In addition, we have recently proposed to permit the use of microwave frequencies to relay programs to translators (notice of proposed rulemaking in docket No. 16424, FCC 66–41).

82. In line with this policy, we think that CATV systems should, upon request, carry the signals of commercial and educational translators operating in the community of the system with 100-w or higher power, where the system has the channel capacity to do so. Since noncarriage may effectively block the translator from access to CATV subscribers (par. 51 of the first report), the inability to reach the central core of the community may well destroy the incentive to establish

translator service for nonsubscribers in the community and persons in the surrounding areas. Moreover, we think that same-day nonduplication should also be afforded to translators carried on the system. Translators operating with 100 w or higher power are properly distinguishable from other translators since they have greater potential for development into stations, and it is particularly important that such development not be impeded by CATV operations.

83. Accordingly, we shall add a fourth priority to the three already listed in the carriage provisions of the rules. Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power. As requested in the comments, exceptions will be added to exempt CATVs from the translator carriage requirement where: (1) The CATV system is carrying the originating station, or (2) the CATV system is within the grade B contour of a station carried on the system whose programing is substantially duplicated by the translator. The provisions of the program exclusivity sections will also be appropriately amended to require same-day nonduplication upon request of a translator station carried on the system.

84. With respect to the second question, whether translators should be required to refrain from duplicating local stations, our present policies and rules are as follows: Pending the outcome of this proceeding, we have been following a policy of conditioning UHF and VHF translator grants with the requirement that the translator, upon request of any station within whose grade A contour the translator operates, refrain from duplicating the station's programs either simultaneously or within 15 days. (*Lee Co. TV Inc.*, FCC 65–483, 5 Pike & Fischer, R.R. 2d 257; *Report and Order in Docket No. 15858*, par. 12.) Under section 74.732(e)(1) of the rules, the only station-owned VHF translators authorized outside the grade B contour of the parent station are high-power (100-w) VHF translators operating on assignments in the Table of Assignments. Moreover, section 74.732 (e)(2) of the rules provides that a station-owned VHF translator which is intended to provide reception within the grade A contour of another station will not be authorized if there is any duplication, unless the translator is intended to improve reception within the principal city contour of the parent station. However, we have waived the provisions of section 74.732(e) (1) and (2) where a nonduplication condition was imposed.

85. Our translator rules and policies are currently in a state of flux. Part II of this proceeding (notice, pars. 61, 64) proposes a reexamination of all of our rules and policies relating to auxiliary services to see if they are holding back or encouraging a variety of off-the-air services. A number of measures were proposed in the comments in docket No. 14848, which were deemed beyond the scope of that proceeding but may be pertinent to this reexamination. It was suggested that the multiple ownership and duopoly rules be amended to allow potential 100-w translator operators to convert these to regular stations and to encourage television station licensees to apply for them. Other suggestions included proposals for increased power for existing translators on other channels; removing the restriction in section 74.732

(e)(1) on the use of VHF translators by television station licensees beyond their grade B contour; permitting translators to be used as relay stations (only) where the need exists; permitting multiple RF amplifiers for UHF as well as VHF translators; and permitting UHF stations to use VHF translators within their grade B contours. Moreover, AMST has recently filed a petition for a comprehensive, affirmative translator program which is being considered as a counterproposal in docket No. 14229, and will also be considered in our resolution of basic translator policies in part II of this proceeding.

86. We are not in a position to resolve these questions now. Moreover, we still lack sufficient information to determine the extent to which the rebroadcast consent provisions of section 325(a) may in practice limit duplication by translators.[43] In addition, if translators were required by rule to refrain from duplication within the grade B contours of regular stations, a question would be presented as to whether the provisions of section 74.732(e) (1) and (2) continue to serve a useful purpose or should be amended. It would be contrary to the public interest to delay a resolution of other portions of part I of this proceeding pending a thorough reexamination of the translator rules and policies. Nor does it appear advisable to undertake a partial revision of the translator rules at this point merely in order to attempt to equalize the position of translators and CATVs. In the circumstances, we think it best to defer rulemaking action until more basic translator policies have been established.

86a. In the meantime, we will continue to grant waivers of section 74.732(e) (1) and (2) in appropriate instances, and will condition station-owned VHF translator grants with a requirement of same-day nonduplication within the grade A contour. In view of our policy of encouraging UHF, we will not impose any nonduplication condition on UHF translator grants for facilities to operate in an all-VHF area. Nor do we believe it appropriate to follow any general policy of requiring a nonduplication condition where the translator applicant is not a broadcast licensee, e.g., a community sponsored translator. It would appear unlikely that such a condition is needed in, or would serve, the public interest. The rebroadcast provisions of section 325(a) may work with greater efficacy in the case of translators not owned by broadcast licensees. Further, the amount of duplication in this type of situation is not likely to be of a substantial nature, since local residents are clearly not apt to undertake the expense and inconvenience of translator operations supported by local assessments or donations unless a substantially different program service is being made available. In these circumstances, we do not think it desirable as a general policy to place any significant barrier,

[43] Although the notice requested information on the extent to which networks and other program suppliers, through contracts or otherwise, affirmatively restrict duplication by translators, no party except National Broadcasting Co. commented on this subject. NBC states that since 1960 it has followed a general policy of granting consent for rebroadcast of its programs provided that the translator is closer to its originating station than to any other NBC affiliate. In a few recent instances, NBC has given rebroadcast consent where the translator operated in an area served by an NBC affiliate, but only for NBC programs which were not broadcast by the local station. See also par. 53 of the first report and order; *National Broadcasting Co.*, 20 Pike & Fischer, R.R. 1013; *Millers River Translators, Inc.*, FCC 63–504, 25 R.R. 516, 518, affirmed in *Springfield Television Broadcasting Corp.* v. *F.C.C.*, 328 F. 2d 186 (C.A.D.C.).

not urgently needed, to the development of such community type translators. We shall, of course, consider whether additional requirements are appropriate, either upon request or on our own evaluation of a particular situation, and will make all translator grants subject to the outcome of part II of this proceeding. We will also take into account, where warranted in individual situations, the possible discriminatory effect of our interim translator policy upon any existing CATV system competing with the translator.

4. Educational television stations

87. The rules adopted in dockets Nos. 14895 and 15233 require the carriage of noncommercial educational stations (ETV), but do not require CATVs to refrain from duplicating their programs. We followed this course because those proceedings were primarily concerned with commercial stations and many of the considerations discussed in the first report and order did not appear to be applicable to ETV. The notice herein recognized, however, that carriage alone might not be sufficient to promote the sound growth of local educational stations. Information was requested in this proceeding as to the nature of any further problems of ETV arising from CATV operations and what Commission action might be appropriate.

88. Other than educational interests, most of those commenting on this subject were against extending any nonduplication protection to ETV, for the asserted reason that the widest possible dissemination of educational material is in the public interest. It is further asserted that CATV competition has no economic impact on ETV because it operates on a nonprofit basis. National Educational Television (NET), the National Association of Educational Broadcasters (NAEB), and Eastern Educational Network (EEN) take a sharply different view in their more extensive comments. They claim that local educational stations, though different from commercial stations, have an even greater need for nonduplication and interim protection because CATV undermines the local financial support and other local interest which is vital to ETV operations. In this they are supported by American Broadcasting Co., AMST, and labor unions representing employees in the broadcast, CATV, and associated talent industries.

89. EEN and NAEB stress the importance of local financial support to educational stations. Although Federal grants-in-aid under Public Law 87–477 are available for the construction of educational facilities, the operations of such stations are almost entirely dependent upon local financial support. Operating income is derived primarily from (*a*) schools and universities, (*b*) local and State governments, and (*c*) contributions and "subscriptions" from the general public and donations by local industries and businesses. Members of the public and local businesses will have little or no incentive to support the local station if ETV is made available on the cable by CATV's importation of outside educational stations. As EEN puts it (comments, p. 12); "It is wholly unrealistic to expect that the public will be willing to pay twice for educational service—to subscribe to CATV *and* to 'subscribe' to local ETV." Diversion of funds provided by local and area educational institutions and local and State governments for inschool television would be even more serious, since these

sources generally provide over one-half of the financial support for local educational stations.[44] If a distant ETV signal is available on the cable, and can be fitted into local schedules of instruction, local schools and local and State governments would be much more unlikely to provide the financial support and other interest necessary to start a local educational broadcast service. This would be particularly the case where the CATV offers to wire the urban schools "free." Unlike the local educational station, the CATV is in a position to make such an offer because it does not pay for programs or maintain expensive facilities for local program origination and it can recoup the cost of free school service through subscription fees charged to the general public.

90. Should CATV activity within urbanized areas siphon off sufficient local financial support to preclude the establishment of a local ETV station, the loss would be keenly felt by the public. The existence and viability of local educational broadcast outlets has special significance for ETV because the educational process is geared to local conditions and needs. Local ETV stations are more than mere facilities for delivering educational programs. They are an integral part of the educational and cultural life of a community and area. This is particularly true where ETV is used for inschool instruction. ETV must plan, prepare, and schedule educational programing on the basis of individual school and community needs, whether the basic program material is produced by the station itself or outside sources. The station also provides study guides for use by the teachers in the schools. CATV cannot effectively provide this carefully planned and prepared service by indiscriminately importing signals from distant educational stations located in cities with different needs and interests.

91. Moreover, local educational stations serve not only the schools and populations in the immediate community; they provide service to the surrounding rural area not reached by CATV. NAEB points out (comments, p. 2):

> Indeed, it is the rural area with limited budgets, facilities, and pupil concentration which has the most pressing need for the teaching resources of educational television. The specialized language, art, music, or science teacher who cannot be supported by a rural school system can, nevertheless, be enjoyed through the pooled resources of educational television.

In this connection we note also comments filed by the American Farm Bureau Federation, National Farmers Union, and National Grange stating that rural residents, who often are relatively remote from the entertainment attractions of the city, probably more than other groups of citizens in the country, rely especially on radio and television as a major source of entertainment and information.[45]

92. Accordingly, the educational interests urge that ETV stations be granted nonduplication protection for a period either the same as

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[44] "The Financing of Educational Television Stations," report of a study conducted by Educational Television Stations, a division of the National Association of Educational Broadcasters, p. 19 (1965).

[45] Apart from ETV, it is stated that rural residents rely especially on local broadcasts giving agricultural information, weather conditions (flood, frost, etc.), pest hazards, and current market conditions.

or much longer than that accorded to commercial stations.[46] Moreover, both NAEB and EEN urge the adoption of procedures to protect communities with educational reservations which have not yet been activated. NAEB requests that the CATV be required to notify local and area school authorities and ETV interests of its proposal to bring in a distant ETV signal. In this way, NAEB states, local ETV interests would be alerted and could bring the matter to the Commission's attention for whatever action or conditions appeared warranted in the circumstances. EEN urges the adoption of interim procedures similar to those proposed for CATV operations in major markets in paragraphs 49 and 50 of the notice.

93. The considerations put forth by the ETV interests are not answered by simply stating that the public interest is served by the widest dissemination of educational material. If CATV operations should prejudice the establishment of new ETV stations on the unused reserved assignments or prevent existing stations from realizing their full potential, the result would be a narrowing of the distribution of educational material—a loss hitting hardest persons residing in rural areas and those unable to afford CATV fees. As in the case of commercial stations, CATV's proper role is to supplement, rather than to supplant, local educational broadcast service. The national policy of encouraging the full development and expansion of ETV is reflected in the grants-in-aid legislation (Public Law 87–477) and has long been a matter of deep concern to the Commission (sixth report and order, pars. 33–49). It would be plainly inconsistent with that policy to accord educational stations less protection than commercial stations if there is any real likelihood of prejudice flowing from CATV importation of outside ETV signals. Considering the continuous financial struggle of ETV and its dependence upon local financial support and interest, we think that the possibility of adverse effect is sufficiently strong to warrant some special protection for ETV.

94. In view of our decision to adopt same-day nonduplication for commercial stations and since it is asserted that effective nonduplication protection for ETV would require a much longer period, we do not think it appropriate to adopt 15-day before-and-after nonduplication for ETV, as requested by NAEB and ABC. There is no agreement among the educational interests as to what time period would be appropriate, and even an extensive nonduplication period would not solve the problem of achieving adequate operational funds for existing ETV stations. We believe that more effective relief to ETV can be provided by the approach discussed in the succeeding paragraph, than by delayed nonduplication periods such as 15 days before and after. Therefore, while recognizing that some measure other than nonduplication may be more suitable for ETV, we shall amend the exclusivity provisions to include educational stations. The rules will thus apply equally to all stations in line with our conclusion (par. 54 above) that they should be the same for all systems. We will, of course, be alert to guard against the possibility that CATV may pose a more acute problem for ETV than presently appears, and

[46] The longer period is sought because of the block distribution process for the NET scheduled service and distribution patterns of regional educational networks like EEN.

would not hesitate to amend the rules should this subsequently prove necessary. ETV interests have indicated their intention to keep us apprised of any worsening developments and are encouraged to do so.

95. Perhaps the most troublesome problem raised by the ETV comments is the possibility that CATV, by bringing outside educational signals into communities where educational assignments have not yet been activated, will siphon off enough local support to preclude the establishment of an educational station. The policy of reserving channels for educational stations is in recognition of the fact that some time may elapse before such stations come into being. While the grants-in-aid legislation has speeded up the process in many areas,[47] the reservations still serve a needed purpose which should not be undercut. CATV provides a valuable service to schools and other subscribers by bringing in ETV which is not yet locally available. But this should not be at the expense of preventing a local service from ever being established. Accordingly, we shall adopt the suggestion of NAEB that local and area ETV interests and school authorities receive advance notice of CATV proposals to bring in outside ETV signals. The attached rules (app. D) require the CATV system to give notice of its proposal to bring in a distant ETV signal, at least 30 days prior to commencing service, to the local superintendents of schools and to the area and State educational television agencies (if any). This will enable ETV interests in the area to make objection to the CATV system where a local station is contemplated. Where a local ETV station is reasonably imminent and objection is made to the Commission, we would not ordinarily approve importation of the distant ETV signal unless it has been established after appropriate proceedings that this would not prejudice the establishment or maintenance of a local ETV service.

96. And, finally, it is asserted by NET and NAEB that, where an educational signal is carried on a CATV on a channel partially used for commercial signals, the placement of commercial announcements adjacent to educational material carried on CATV jeopardizes the public image of ETV and prejudices its position with program suppliers and copyright owners who insist upon noncommercial presentation. However, we do not think that a sufficient basis has been shown for the relief requested, i.e., prohibiting commercial announcements adjacent to educational programing or requiring CATVs to devote channels exclusively to educational programing. We cannot undertake to preserve ETV or commercial stations harmless from all conceivable prejudice no matter how slight. Moreover, we are reluctant to interfere with CATV operations any more than necessary in the public interest or to impose requirements not shown to be essential. CATV systems with limited channel capacity and those carrying a large number of commercial signals might find it difficult to devote channels exclusively to ETV. CATVs may also wish to use educational signals to fill in portions of commercial signals which cannot be carried because of the nonduplication requirements. Moreover,

[47] The number of educational TV applicants in UHF (where most of the unused educational reservations are) has increased from 5 at the beginning of 1962 to 30 as of the end of 1965; during this period 34 more UHF educational stations went on the air.

since educational stations normally do not have as long a broadcast day as commercial stations, the CATV system may wish to provide its subscribers with other material during the time that the educational station is not broadcasting. In view of the station identification announcements made during the course of the educational programing, it seems to us that the prejudice to the originating ETV station, if any, would be minimal.

D. Procedural Matters

1. Ad hoc procedures

97. It has been suggested in the comments that the Commission should adopt specific rules providing for summary, nonhearing procedures to handle requests for waiver of the CATV rules or for different treatment or affirmative relief. We think the suggestion has merit. The general provision for waiver of any rule (sec. 1.3 of the rules) does not afford an adequate procedure for seeking additional affirmative relief or different treatment. Moreover, such procedures would be useful to handle requests for rulings on complaints or disputes. We recognize that to hold hearings upon each such request relating to carriage, nonduplication, and ETV, would be time consuming and burdensome to the CATV systems and stations involved, particularly those in smaller communities. In addition, while such procedures will not apply to the matter of distant signals in the top 100 markets, for which a showing made in evidentiary hearing is required (see par. 141 below), they could be utilized in many instances to resolve distant-signal questions in the smaller markets.

98. Accordingly, we have undertaken in section 74.1109 of the attached rules to devise flexible and fair procedures which will generally permit expeditious processing of such requests. The procedures require a written petition with notice to interested persons and afford an opportunity for submission of comments or opposition to any request and for reply. Upon good cause shown, the Commission may shorten the times specified in the rules for the filing of opposition or reply comments. The petition and all other pleadings filed by the petitioner or interested persons must contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon. In the case of complaints or disputes, the steps taken by the parties to resolve their problem must also be set forth. The Commission will, where possible, promptly dispose of the matter on the basis of such written submissions. However, additional procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, may be specified by the Commission if they appear necessary or appropriate after consideration of the pleadings.[48] In the event that the petition involves new service to CATV subscribers, the Commission will expeditiously rule on the matter, either in whole or to the extent of determining whether there

[48] Since petitions under the ad hoc procedures may involve the resolution of controversial issues which in basic fairness should be determined on the pleadings of the parties, we shall amend the ex parte rules to make them applicable to proceedings under sec. 74.1109, as well as to proceedings under sec. 74.1107. The principles discussed in par. 9 of the report and order in docket No: 15381, FCC 65–598, 1 F.C.C. 2d 49, will also apply.

should be a stay or other temporary relief pending such additional procedures as may be required (see par. 100 below).

2. Information to be filed with the Commission by existing CATV systems; notification by new CATV operations

99. Pursuant to our authority under section 403 of the Communications Act, all existing CATV operators will be required to submit to the Commission, within 30 days after the effective date of our order herein, the following information with respect to each of their CATV systems: (*a*) The names, addresses, and business interests of all officers, directors, and persons having substantial legal or beneficial ownership interests in each system;[49] (*b*) the number of subscribers to each system both currently and as of February 15, 1966; (*c*) the television stations carried on each system; and (*d*) the extent of any existing or proposed program origination by each CATV system. Any CATV system which is located within the predicted grade A contour of a television station in the top 100 television markets (as ranked by ARB on the basis of net weekly circulation of the largest station in the market) and which carries the signal of a distant station(s) will also be required to submit a map showing the location of its cable lines being used to serve subscribers on February 15, 1966.[50] It is not practicable to apply the notification provisions set forth below to the present operations of existing systems, and there is no comprehensive or accurate listing of CATV systems available to apprise television station licensees or permittees of all existing CATV operations within their grade B contours. Indeed, we have noted that while the recent growth of CATV is of an impressive nature, there are conflicting estimates as to the precise dimensions of that very substantial growth. The information obtained will assist the Congress in its consideration of the Commission's legislative proposals in the CATV field, and the Commission in its consideration of matters in part II of the notice and petitions described in paragraph 149 below.

100. New CATV systems will be required to notify the licensee or permittee of any television broadcast station within whose predicted grade B contour the system will operate and the licensee or permittee of any 100 w of higher power translator located in the community of the system, with a copy to the Commission, concerning the proposed operation within 60 days after obtaining a franchise or entering into a lease or other arrangement to use facilities. In no event may new service be commenced until 30 days after notice has been given. The notice shall include the name and address of the system, identification of the community to be served, the television stations to be distributed, and the estimated time for the commencement of operations. Similar notification will be required by existing systems which propose to add new distant signals (at least 30 days prior to commencing service) or to extend lines into obviously new geographic areas (within 60 days after obtaining a franchise or entering into a lease or other arrange-

[49] In stating the ownership interests in a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

[50] Existing systems in the markets below 100 may subsequently be required to submit a map showing the location of lines as of a specific date in connection with any petition for ad hoc consideration of a geographic extension into new areas.

ment to use facilities or at least 30 days prior to commencing service where no new local authorization or contractual arrangement is required). In addition, as already indicated, notice to local and area educational authorities and ETV interests will be required at least 30 days prior to commencing service where carriage of a distant ETV signal is proposed. Such notification will afford the local television stations and other interested persons an opportunity to request carriage and nonduplication under the rules or to petition the Commission for different requirements before service is commenced and thus avoid disruption to the public. Where a petition for ad hoc consideration is filed with the Commission by any station, CATV system, or other interested person within 30 days after notice, new systems and existing systems proposing to add new distant signals shall not commence new service until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.[51] In the event that an evidentiary hearing is required, the question of whether there should be a stay or other temporary relief pending the hearing will be expeditiously resolved prior to the hearing on the basis of the pleadings of the parties and such additional written submissions as the Commission may request.

3. Form and enforcement of the new rules

101. Aside from the obvious distinction that nonmicrowave CATVs do not file applications for licenses with the Commission or use licensed facilities, no special problems of substance or procedure in making the carriage and nonduplication requirements applicable to them have been called to our attention and none is apparent to us. While the substantive requirements will therefore be the same for all systems, some differences in form or procedure are necessary in the case of the nonmicrowave CATVs. First, the obligations will be imposed directly on the CATV system itself, rather than taking the form of conditions on microwave authorizations. Second, enforcement will be through the cease and desist procedures set forth in section 312 (b) and (c), or pursuant to section 502, of the act and will not include other sanctions applicable to licensees. And, third, some change is required in the provisions requiring notification to all licensees or permittees of television stations placing a grade B or better signal over the community of the CATV system that a microwave application has been filed or a request has been made of a common carrier for microwave service. (See sec. 2 above.)

4. Retention of the microwave rules

102. It is urged by American Telephone & Telegraph Co. and by U.S. Independent Telephone Association (both in comments in docket No. 15971 and in its petition for reconsideration of dockets Nos 14895 and 15233) that the rules governing microwave grants should be deleted when the obligations are imposed on CATV systems directly. We think it best to retain the rules conditioning microwave grants (as revised herein) in their present form for a while longer, until CATVs

[51] The matter of extension of lines into new geographical areas by existing systems in top 100 markets is discussed in par. 149 below. As already indicated, the ad hoc procedures do not apply to new service involving distant signals in the top 100 markets or obviate the need for evidentiary hearing as set forth in pars. 141–143 below.

generally are operating in accordance with the new rules. Pending such compliance, we cannot make the requisite public interest finding for the issuance of the microwave licensee in the absence of a showing that the facilities will be used in accordance with the conditions. Moreover, the requests of A.T. & T. and USITA are primarily grounded in the alleged burden to the common carriers, which will be substantially alleviated in this interim period by the revisions made in the memorandum opinion and order on reconsideration in dockets Nos. 14895 and 15233, 1 F.C.C. 2d 524. However, once widespread CATV compliance with the new rules has been achieved, some modification of the microwave rules would clearly appear to be appropriate and we shall take action toward this end as soon as it is possible to do so.

5. Transition period

103. In the first report and order (par. 161) and in the notice (par. 34), we stated that we would consider in this proceeding the question of whether there should be some kind of transition period before the carriage provisions are made fully applicable to microwave and nonmicrowave systems with limited channel capacity. To obtain relevant information, the Commission mailed a questionnaire to every known CATV operator. The questions were designed to elicit specific information with respect to the effective channel capacity of each system, the local television signals which might fall within the carriage provisions of the rules, and the number of channels in use for nonlocal television signals or other purposes. Responses were received from 1031 CATVs, of which 250 were microwave-served and 781 were nonmicrowave.

104. Upon analysis of the responses, it appeared that less than 20 percent of the microwave systems were not in compliance with the carriage provisions, and half of these either had the unused channel capacity to come into compliance, or, in view of plans to expand the system, would shortly be able to comply. Less than 10 percent of the microwave systems could not comply with the rules without having to drop one or more signals currently carried. Accordingly, the Commission, on December 8, 1965, determined that there was no need to afford microwave-served systems a general delay in the application of the rules relating to carriage, and notified all common carrier and Business Radio Service licensees serving CATVs that the rules would be effective on and after February 1, 1966, to renewal applications. We further advised such licensees that the renewal application should contain a request for waiver of the rules relating to carriage, if a waiver were desired, together with the following showing:

> The request for waiver should include the petition by the CATV system that the microwave licensee seek the waiver from the Commission; and the system should include a statement that it has served a copy of that petition on any television station to be affected. The request for waiver should demonstrate the hardship to the CATV system, the disruption of service to the customers of the CATV system which would result from immediate compliance with the carriage requirements, the need for the particular length of time for which the waiver is requested, and the future plans to come into compliance. Finally, the request should state whether substitution of the local station's signal on a simultaneous-only basis will be afforded during the period for which any waiver is granted where the local station is not now carried and its programing is duplicated by a more distant signal. See *Black Hills Video Corp.*, 6 Pike & Fischer, R.R. 2d 199, at 201 (par. 9).

105. With respect to the 781 nonmicrowave systems who responded to the questionnaire, it appears that 605 are already in compliance with the carriage requirements of the rules. An additional 87 systems have sufficient unused channel capacity, or are expanding their capacity, and would be able to comply without having to drop any presently carried television signal. Two systems might have to utilize a channel presently carrying FM radio and CATV originated programing, and 10 systems furnished insufficient information for any conclusion as to their situation. There remain 77 systems which would have to drop one or more television signals presently carried in order to add one or more television signals required to be carried by the rules.

106. Thus, as in the case of microwave systems, it appears that only a comparatively small percentage of the nonmicrowave systems could not comply with the carriage provisions without substituting a local for a more distant signal. In the circumstances, we believe that there is no need to provide for a general transition period by rule. The problems of individual systems will be considered on a case-by-case basis, upon a request for waiver making the same showing applicable to microwave systems. Accordingly, the rules will apply immediately to all new CATV systems commencing operations on or after their effective date, and will apply 60 days thereafter to existing systems unless a request for waiver has been filed with the Commission. Our aim is to allow an orderly transition period for the relatively small number of systems with limited channel capacity whose viability might be jeopardized by immediate application of the rules, or where existing service to CATV subscribers would be unduly disrupted (as against the *Black Hills* type of protection (6 R.R. 2d 199, at 201 (par. 9)) during the appropriate transition period).

107. The foregoing discussion of the apparent situation with respect to carriage does not take account of 100-w translators operating in the community of the CATV. Our decision (pars. 82, 83 above) to accord high-power translators fourth priority may raise some additional channel capacity problems. While this new provision will have the same effective date, waivers may be sought by microwave and nonmicrowave systems either within the 60-day period or upon receipt of any request for translator carriage which gives rise to some problem.

6. Copyright suits

108. Finally, we shall make brief mention of the copyright matter because, despite our plain statements in paragraph 159 of the first report, there would still appear to be some confusion on the part of some persons as to the effect of our carriage and nonduplication rules upon the pending copyright disputes. We have stated that our decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. Thus, the fact that we have given the local station the right to have its signal carried over the CATV system (and not duplicated for a reasonable period), affords no defense to that system in a copyright suit. The station cannot

bestow broadcast or transmission rights to programing which it does not own (or as to which it has not obtained a license to do so). See *Report on Rebroadcasting Rules*, 1 (pt. 3) Pike & Fischer, R.R. 91: 1133, 1134, 1137, where we stated in connection with rebroadcast rights under section 325(a), that the section "may no longer accurately reflect present conditions" since most programs were not owned by the originating station who could not therefore legally grant the rebroadcast permission sought. In short, if the copyright suits are decided adversely to the CATV industry, we may, as stated in the first report, have to revise our rules.[51a] We have acted now, in light of the present copyright situation, which would appear likely to obtain for some substantial period of time, and without the slightest intent of affecting the determinations to be made in the pending suits.

CONCLUSION AS TO PART I

109. The foregoing are the rules which we believe to be appropriate for all CATV systems at this time. We believe that they represent a fair balancing of the competing interests, and properly accommodate both industries and thus, the public interest "in the larger and more effective use of radio" (sec. 303(g)). We recognize further revision may be called for as we gain experience in their implementation. This docket (15971) remains open with this report designated as the second report, and we shall revise the rules, as the public interest requires, in our consideration of part II or upon the basis of new information or experience (and, if appropriate, after giving notice of such proposed revisions). Finally, as in the case of all rules, we shall give further guidance through the medium of rulings directed to specific situations.

110. In light of the foregoing, we find that the public interest would be served by modification of the rules previously promulgated for microwave-served CATV systems and the adoption of rules governing all CATV systems, as set forth in the attached appendix D. Authority for the rules adopted herein is contained in sections 1, 2(a), 3(a), 4 (i) and (j), 303, 307(b), 308, 309, 310, 319, and 403 of the Communications Act of 1934, as amended.

PART II. MAJOR MARKET, DISTANT STATIONS POLICY—PARAGRAPH 49–50 OF THE NOTICE

A. The Notice; Comments

111. In the notice, we stated (par. 49, 1 FCC 2d at p. 471):

> * * * pending the outcome of this proceeding, applications for microwave facilities to be used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the area. A like showing must be made in applications for microwave facilities to serve a

[51a] And, of course, stations will have to take into account the effect of any copyright decision in making requests for carriage under the present rules.

> CATV system in a community where, because of its proximity to another community (or communities) having three or more existing commercial stations (e.g., within the grade B contour of such three or more commercial stations), any new UHF television station would be independent in operation.

In paragraph 50, we specifically invited comment:

> * * * on whether the foregoing course of action as to applications before the Commission should be extended to the nonmicrowave CATV system in the same type of situation (e.g., through a rule which would prohibit the extension of the signal of any television station beyond its grade B contour into a community with the situation described above (par. 49)), without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community.

112. We have considered the comments received on this important aspect. A summary of some of the comments is set out in appendix B.

B. Evaluation

113. The discussion in appendix B gives some of the highlights of the comments submitted on this aspect. The more detailed showings have, however, been considered, and will be referred to in the ensuing discussion. While these showings are pertinent, particularly with respect to the trends which are so important to our evaluation, they do not supply definitive answers to the problems before us; rather, they serve to point up the problems and, in the circumstances, to the procedures called for. We shall develop the underlying considerations at some length, and even with some repetition of the discussion in part I, because of the great importance of the matter. There are two central grounds for our action—(1) an economic impact ground, based on the trends in the CATV and UHF fields; and (2) a fair competition ground, based on the patently anomalous conditions under which the broadcasting and the CATV industries compete.

1. The economic impact ground

114. *The UHF trend.*—As stated in our notice, we are at a watershed in the development of UHF broadcasting. UHF broadcasting generally suffered a very serious setback in the 1950's and limped along until the passage of the all-channel receiver legislation. In enacting this "unique" legislation in 1962, Congress made the judgment that development of UHF "is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States" (H. Rept. No. 1559, 87th Cong., 2d sess., p. 4; S. Rept. No. 1526, 87th Cong., 2d sess., p. 7). Such a system would "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression," provide "at least three competitive facilities in all medium-sized communities," and make provision "for at least four commercial stations in all large centers of population" (H. Rept. at p. 3). Such a fourth station might make possible a fourth national network or the formation of "FM-type networks" in television, and also would be "valuable particularly for local programing and self-expression"—an important need in many markets "because all of the available stations are network affiliates" (H.

Rept. at p. 3; S. Rept. at p. 4). Thus, as shown by the above and the compulsory sale of all-channel sets at the rate of over 9 million a year, Congress and the American public have staked a great deal on the development of UHF.

115. As we pointed out in the notice and our prior discussion, there is every present indication that the all-channel set requirement is having its desired effect, with greatly increased interest in UHF, particularly in the many applications filed for the larger cities. Thus, from the beginning of 1962 to the end of 1965, the number of UHF commercial stations on the air increased from 85 to 100, and most significant as an indication of the trend, the number of applications pending (with multiple applications for the same channel counted once) increased from 19 to 80. There are now indications of the beginning of a fourth network or of an "FM-type" network, involving UHF and VHF stations in some major markets. With this increased ferment in UHF, we believe that the next few years will supply the critical answer to whether the congressional goal of a truly nationwide television system employing both UHF and VHF on an effective intermixed basis will be achieved. (See H. Rept. at p. 7; S. Rept. at p. 6.)

116. *The CATV trend.*—The CATV trend is even more pronounced, and has already been noted in our first report, paragraph 65, 38 F.C.C. at page 709, and in the prior discussion (pars. 31–33). As stated, the CATV growth has been explosive and gives every indication of continuing its phenomenal spurt. In 1959, there were about 550 CATV systems, in 1965 at the time of the first report, there were about 1,300 CATV systems, and today—less than a year later—it is estimated that there are 1,565 (Television Digest, Dec. 27, 1965, at p. 3). Further, there are 1,026 CATV franchises which have been recently granted but are not yet operating (ibid.). The number of applications for franchises is even larger—an estimated 1,958.[52] Clearly, there is considerable substance to the statement of the official of one of the largest CATV groups, quoted in our notice (par. 39, 1 FCC 2d at p. 468):

> The competition for CATV franchises is unparalleled in the history of American communications. It exceeds even the pell-mell scramble for television broadcasting permits that occurred throughout the United States in the first few months after the long television freeze in the late forties and fifties. We learn that new CATV systems are being sought or authorized at the rate of one a day * * *.

117. Equally important is the changing nature of the CATV operation. In 1959, the average CATV provided three signals to its subscribers; in 1965 the majority provided five or more signals (par. 65, first report), and the average system built today has 12-channel capacity.[53] There are now 20-channel systems proposed (e.g., the Jerrold proposal in Philadelphia), with industry leaders predicting

[52] As noted, the estimates as to franchises granted and applications vary. See pars. 31, 116, supra. NCTA reported recently that 1,500 applications for CATV permits had been filed in the last 12 months and that 1,200 were pending (N.Y. Times, Dec. 19, 1965). By any estimate (e.g., TV Digest, AMST, NCTA), the figures are impressively large.

[53] In its reply comments (p. 18), AMST asserts that of 54 systems for which data was available and which began operations in 1965 (through July of 1965), only 5 were 5-channel systems; 44, or 81.5 percent were of 12-channel-capacity.

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that in the next 5 years "improved technology will have made the 20-channel CATVs commonplace * * *" (Television Magazine, Dec. 1965, p. 31). There is greatly increased use of microwave facilities (i.e., from 50 systems using microwave in 1959 to 250 in early 1965 to about 450 today). The distance which signals are taken has also increased greatly (to over 665 miles). Finally, the CATV industry has shifted its attention to the larger communities, and CATV franchises have been granted or are being sought in such cities as Philadelphia, Toledo, Cleveland, San Diego, Dayton, Baltimore, Syracuse, Albany, Sacramento, Pittsburgh, Birmingham and Fort Wayne. To quote again the large CATV group (par. 39 of the notice):

> First, and of overriding importance, is the shift of CATV strength to a new locus. The centers of the most intense CATV development now are the very large cities. In the past our attention was focused on the smaller markets and in these we reached about 2 percent of the Nation's television population.
>
> But today we are in the throes of spirited competition for the development of cities such as New York, Philadelphia, Cleveland, Birmingham, Syracuse, Rochester, Wilmington, Norfolk, the entire State of Connecticut, and entire counties such as the 37 cities of Camden County, N.J., all of Montgomery and Chester Counties, Pa., etc. * * *.

The CATV applicant believes that it can be successful in such cities because it will bring better reception (particularly as to color) and, most important, the programing of important independents (e.g., the three New York independents to Philadelphia).

118. It is apparent that these two trends (UHF and CATV) raise a serious question. Both CATV and UHF broadcasting, for example, are entering the larger markets, most often in an effort to bring programing that is not now available in these markets. There are at least 163 communities or areas with UHF stations operating, authorized, or applied for which also have CATV activity. In 68 such communities or areas, there are already operating CATV systems; 29 have CATV systems franchised but not operating, and 66 have CATV applications pending. In the notice, we set out as an example the Philadelphia area, where there are now three commercial UHF stations on the air (and another one authorized) and there are several well-financed CATV applicants seeking to bring in the signals of the three New York independents. The most critical question posed is how these two trends mesh in the ensuing years.

119. We have studied the comments carefully in this respect. While they give some indications (see par. 122, infra), the answer remains uncertain. On the one hand, the NCTA, relying largely on the Seiden report, contends that CATV in a large community such as Philadelphia can have little effect on the healthy existence of UHF stations; that if anything, CATV will aid these stations by bringing them into homes where they might not otherwise be received. But we believe that this contention has significant defects.[54] In any event, it would appear

[54] The Seiden report assumed "an optimum" of 50 percent penetration of the Philadelphia market by the CATV (but see para. 122–123 as to the "optimum" CATV penetration), and then, based on the fact that the three New York independent stations account for 9 percent of the TV homes during prime time, arrived at the conclusion that there would be a diversion from the Philadelphia UHF stations due to CATV of only 61,450 homes but of 1.3 million TV homes in Metropolitan Philadelphia (report, pp. 84–86). As already noted (n. 19, notice) the report measures the diversion as against the total Philadelphia

that a crucial consideration is whether the Seiden report is correct in its belief that in the large cities, it "is not clear as to what these CATV promoters will offer that makes them think that they gain substantial numbers of subscribers in such areas" (Seiden report, p. 84). In his judgment, "potential CATV markets are those areas lying 40 or more miles distance from three full network signals * * *" (id. at p. 83).

120. But very important segments of the CATV industry do not agree with the Seiden report. They are proposing to invest very large sums of money (including amounts such as $40 million) in their belief that CATV, employing 12, 20, or even greater capacity systems, can gain very substantial audiences in these large markets. The leaders of such important CATV groups as Jerrold or Teleprompter believe that "almost all American cities—small and large—will be wired for television * * *" and, in the words of the top official of Teleprompter, "within the next decade, 85 percent of all television sets in the United States may be receiving their programs by cable rather than over the air" (Television Magazine, Dec. 1965, p. 30). Another experienced CATV operator estimated more conservatively that CATV may reach 30 to 35 million households within the next decade (Broadcasting Magazine, July 26, 1965, p. 31).

121. We do not accept the above statements as necessarily correct, any more than we accept Dr. Seiden's assertion to the contrary. The plain fact is that on the record before us, it is not possible to give a definitive answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets.[55]

122. Indications in the materials before us would appear to indicate substantial growth and substantial impact by CATV in the large

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audience, plainly ignoring the very facts upon which the analysis is based. The point is that whatever criterion is used to measure CATV impact, the same criterion should be used to measure the audience UHF would have without CATV. If, therefore, it is assumed that 9 percent of the CATV subscriber homes would, on the average, be watching the three New York independent stations and would therefore be diverted from the three Philadelphia UHF stations, the resultant figure—61,450 homes—should be related not to the 1.3 million TV homes in Metropolitan Philadelphia, but rather to the average number of homes in Metropolitan Philadelphia that would be viewing the three UHF stations if there were no CATV. The audience for nonnetwork programing in Philadelphia is certainly no greater than in New York (and indeed would undoubtedly be much smaller in the beginning). If, therefore, 9 percent of the TV homes during prime time were assumed to be the number which, on the average, would be watching the three Philadelphia UHF stations, this would result in a total average audience of less than 120,000 homes against which the impact of a loss of more than 60,000 homes should be measured rather than against 1.3 million TV homes. In short, the Philadelphia audience which would be attracted to the New York independent stations is a very important part of the audience at which any independent Philadelphia UHF station must aim—a critical point ignored by the Seiden report.

We would also point out several other factors: (i) The potential effect on the UHF independent becomes even more serious when markets smaller than Philadelphia are considered (see footnote 57); (ii) it is unrealistic to assume that UHF independents in such markets will have the financial base to bid for and obtain the same amount of expensive nonnetwork film program as the New York VHF independents, with their much larger population base, and thus, the CATV audience for nonnetwork programing may well not be divided equally between the UHF independents and the distant VHF ones; and (iii) the 20-channel system would permit the importation of the New York network stations which would also contribute to diversion of audience during the 30–45 percent of time these stations are presenting nonnetwork fare.

[55] As stated, the CBS study indicated that it had not included "* * * a group of application for CATV systems in communities with three more than adequate services [e.g., * * * applications for franchises * * * in places like Albany, Syracuse, Galveston, Philadelphia, and Cleveland * * *]. If these systems are established and thrive, it is clear that the potential for community antenna systems far exceeds anything that we have talked about thus far and, in fact, much of the country could ultimately become CATV territory." (CBS comments, exhibit A, pp. 16–17.) Thus, CBS focus was on the old or "traditional" CATV and not the new developing trend in the industry.

markets. Thus, Midwest Television, the licensee of a San Diego station, submitted a study made by an independent research organization in late June 1965, of the San Diego area, the 51st market (ARB ranking on net weekly circulation), with three VHF stations and CATV systems which carry these stations and all seven Los Angeles VHF stations without nonduplication treatment. The study indicated that the CATV systems, with a present total of roughly 10,000, are adding subscribers at a rapid rate. Thus, in one section where CATV had been available for only 3 months, more than 36 percent of the homes had already been wired for CATV; as of late June, 43 percent of the CATV subscribers interviewed had been subscribers for less than 3 months (Midwest comments, dockets Nos. 15971, 14895, and 15233, pp. 24, 28). But this study is obviously too fragmentary to be conclusive on this important question. The study also indicates very considerable impact upon the local stations. See paragraphs 40–41, supra.[56]

123. There is no doubt as to the seriousness of the question posed. The new UHF stations face a difficult road; we would expect, with the passage of time and thus the build-up of all-channel sets, and related endeavors, that these new operations would be successful. But if a CATV, with 12- or 20-channel capacity, can obtain very substantial numbers of subscribers in these same markets (by which we mean percentages of 50 percent or over), the UHF stations might face a very difficult hurdle. The audience for nonnetwork stations is limited (about a 10-percent share in most markets in the prime time) and this limited audience might be greatly reduced since very substantial numbers of people interested in viewing the nonnetwork programing would be watching the distant independents (e.g., those of New York or Los Angeles). We think this follows as a matter of commonsense, since these established big city VHF independents certainly have the ability to bid for and acquire the expensive, attractive nonnetwork programing. Any gain in better reception of the UHF signals might be far outweighed by the splintering of the limited audience for independent programing. The UHF stations will in any event gain a very substantial audience in these markets, through the operation of the all-channel receiver law. While the CATV might bring them a little sooner or with somewhat better reception into some TV homes, it would appear to do so at the cost of fragmenting greatly the limited audience interested in viewing nonnetwork programing in the prime listening hours. See note 54, analyzing the Philadephia situation on the basis of a 50-percent CATV penetration.[57] As pointed out, the

[56] To the same effect, see the address of Mr. George Blechta of Nielsen at the July 1965 NCTA convention, where Mr. Blechta referred to an eastern television market "where the sample indicated that one-third of the viewers are CATV subscribers and that the local stations have a combined share of audience of 85 percent among non-CATV homes in contrast to a share of 'less than one-half' among CATV homes." (Sponsor Magazine, July 26, 1965, p. 14.)

[57] Further, Philadelphia is the fourth largest market in the country. But in smaller, even though still major, markets, similar analyses raise even more serious questions. Thus, in the Sacramento-Stockton market (the 27th in ARB ranking) having 300,400 TV homes in the metropolitan area, 63 percent or about 189,000 metropolitan area homes on the average are watching television in prime time; without CATV, the UHF would do well to get a prime-time audience of 15,000 homes. While this audience, on the basis of our experience, would normally appear sufficient to support operation, obviously, significant diversion of the audience by CATV could be a serious matter. Yet CATV systems could bring in the VHF independents from San Francisco and, as we understand, from Los Angeles also. This example, dealing with a major market, could be multiplied many times.

nonduplication provision would afford virtually no relief, since nonnetwork programing is not distributed on anything like a simultaneous nationwide basis.[58] The rise in advertising demand for television time is also pertinent to this question; as noted (footnote 30), there are countervailing considerations which, at the least, require that this fact be considered in the context of the particular situation (e.g., in Philadelphia there are three and possibly four new stations to share the increased advertiser demand). Finally, we point out that it is not just a matter of causing the demise of the independent UHF stations; if these stations' revenues are substantially reduced because of such CATV activity, so that they do not have the financial base to program effectively, the result is still a detriment to the public interest "in the larger and more effective use of radio" (Communications Act, sec. 303(g)). In short, the problem posed is whether, if CATV succeeds greatly—for example, to the 50- to 85-percent figure predicted by its optimistic proponents—there is correspondingly a grave danger to UHF broadcasting.

124. It has been urged that we simply ignore the problem and let events in the major markets decide between CATV and the UHF broadcast stations. But for reasons already developed, such a course would be inconsistent with our statutory responsibilities and might lead to results inconsistent with public interest in a number of respects:

(i) CATV does not now serve the rural areas, and it has not been established that it can practically do so. If CATV were to undermine the healthy development of UHF, it would mean that people in the urban or more built-up areas would be getting additional service at the expense of those in the rural areas; we think that such a result is patently inconsistent with the public interest and the Act's goals.

(ii) CATV is a form of pay-TV, in the sense that one must pay to obtain the television service. There are substantial numbers of people who either cannot afford to or do not wish to pay for television.[59] If then the CATV blocks development of UHF broadcasting, it would again mean that some people would be getting additional service at the expense of those who cannot afford or are unwilling to pay for such service.

(iii) Most important, CATV does not serve as an outlet for local self-expression. It does not present local discussions, the local ministers or educators, the local political candidates, etc. If events in the major markets should establish that CATV has prevented the healthy maintenance of UHF broadcasting, it would mean that, for example, New York independents would have been substituted for Philadelphia independents. We think that would be contrary to sound allocation principles, long established in section 307(b) of the act. It would be a clear frustration of the congressional purpose recently stated of making available in areas such as Philadelphia additional broadcast stations to meet the "important needs" for "local programing and self-expression" (par. 41, notice). It would also undermine the goal of a fourth national network built upon these additional stations (par. 41, notice).

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[58] Nor would extension of the UHF station's signal beyond its grade B contour by CATV systems compensate for fragmentation within that contour by CATV systems having very substantial penetration. We note that CATV systems tend to bring in the distant big city independents (since such stations constitute a better sales point in obtaining subscribers) rather than the new UHF stations. In any event, an independent's source of revenue is the local and national spot business, as to which the metropolitan area rating plays a very significant role. As shown by the above discussion, that rating could be seriously affected in the event of very substantial CATV penetration.

[59] Thus, even the CATV industry estimates that on an industrywide basis CATV systems now in existence have achieved about 55 percent level of the total number of TV homes in the markets served, and that this figure will ultimately rise to 70 percent. (Television Magazine, Dec. 1965, p. 30).

125. If the New York independents sought translators to place their signals over the Philadelphia area, it could not seriously be argued that we should grant such applications on the ground that while they may be destructive of congressionally established goals, events in the market place should be allowed to give the answer. The matter is not really different here. The Commission has jurisdiction to "establish areas or zones to be served by any station" (303(h)), to make a "fair and equitable distribution of facilities among the several States and communities (sec. 307(b)), and "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions" (4(i)). If then we sit back, even though we have the jurisdiction, the authority, and the responsibility to carry out the congressional policies, and do not thoroughly explore the serious question posed, we would be simply abdicating our responsibility "to promote the larger and more effective use of radio in the public interest" (sec. 303(g)).

126. To summarize, we have reached no final conclusion in this area—i.e., the effect of CATV development in the major market on UHF broadcasting. But we have concluded that there is a substantial problem of great significance to the public interest, which must be thoroughly explored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if that growth is of a high order, its impact on UHF development may be most serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and more effective use of radio." In view of these conclusions, we think that our course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."

127. We have focused in the above discussion on the independent UHF station. But as interested parties such as Storer have stated, there is also a problem with respect to the new UHF station in a market with two VHF stations. The UHF station does not necessarily obtain a full line of network programing in such markets; either initially or for a considerable period of time, it may be dependent to a very substantial extent on nonnetwork fare. Further, several parties have expressed the fear that because of CATV, such new UHF stations will not be able to obtain a primary network affiliation. Finally, we note that to a significant degree, whether rightly or wrongly, CATV penetration would appear to have a discouraging effect on entry of new UHF stations (or on the substantial expenditures which must be made for the high tower and power necessary for an effective operation). Permittees of several new stations have set out their fears of the consequence of CATV importation of distant stations from New York, Los Angeles, etc. To give but two examples:

(i) The permittee of the new UHF station in Sacramento has informed the Sacramento City Council that the importation of outside signals from San Francisco-Oakland and Los Angeles, as proposed, would make it impossible for the UHF station to survive (joint comments, p. 15).

(ii) [Regardless of whether Jerrold's proposed Jacksonville CATV system will be subject to carriage and nonduplication], it is your permittee's belief that should Jerrold introduce through its proposed system the programs of the three television networks, it will be impossible for WJKS-TV to obtain the network affiliation required for its survival. (Statement of Rust Craft Broadcasting Co., permittee of UHF station WJKS-TV, Jacksonville, Fla.; AMST comments, p. 71.)

The above examples are not cited at this point for the correctness of the attitude taken toward CATV penetration in the particular situation, but rather for the attitude.[60] We think it important, in view of the critical period facing UHF, that the UHF entrepreneur be given a forum for thorough exploration of this serious problem.

128. The contentions of some of the parties with respect to pay-TV are also pertinent here. Several parties (e.g., ABC, Westinghouse, AMST) have stated that CATV, particularly if it succeeds in the major cities, can readily branch out into pay-TV (for example, by providing that one channel will be "original" programing available only for a specific additional charge—a form of pay-TV somewhat akin to the Bartlesville experiment in 1957–58). The parties assert that whether or not pay-TV is desirable, it should be initiated only after full consideration in an appropriate proceeding and not "come in the back door" through CATV operations and profits based on the sale of the broadcast industry's product.

129. Whether a form of pay-TV operation will result from CATV is uncertain and would appear to depend again very largely upon the growth factor, particularly in the larger cities which would naturally be the backbone of any wire-pay-TV operation. But we would agree that in the circumstances its authorization should stem from the Commission (or the Congress) after appropriate proceedings. For, what is involved is not the strictly wire-pay-TV proposals such as recently attempted in California. A hybrid CATV-pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals (to provide the economic base for the pay-TV "frosting"), and such use of broadcast signals should be allowed only if it is found to be in the public interest. We have petitions now under consideration, which seek the authorization of pay-TV on a regular basis using broadcast facilities, perhaps only in the UHF portion of the spectrum. It is clear that until resolution of the very important policy issues, pay-TV operations based in substantial part on use of broadcast signals is inappropriate. Since here again the critical factor is the growth of CATV in the larger cities, we think that this is added reason for the policy and procedure we have adopted, since that procedure will be especially applicable to such cities. We intend to explore thoroughly the relationship, if any, of proposed CATV operating in the larger markets and the development of pay-TV in that market. This is a matter which is also involved in part II of

[60] We note also that the contrary opinion has been expressed by some new UHF entrepreneurs (namely, that CATV operation will aid, rather than hurt them).

this proceeding, and will be the subject of a specific legislative recommendation of the Commission. See paragraph 153, infra.

130. We believe that the foregoing discussion, showing the serious question posed by the potential effect of very substantial CATV development upon UHF development and the possible adverse consequences to the public interest, demonstrates the need for the major market, distant signals policy which we have adopted. Before discussing that policy (see pt. 3, infra), we shall turn to a second ground which also, in our judgment, supports the need for the policy.

2. Fair competition

131. We have previously discussed this "fair competition" ground in connection with the nonduplication requirement. See first report, paragraphs 52–57, 28 F.C.C. 683, 703–706. That discussion, which will not be fully repeated, is pertinent here. As shown, the CATV industry is growing at a tremendous pace, with a changing nature (entry into major markets, with 12- or 20-channel systems, bringing the signals of big city independents such as those of New York and Los Angeles). If the CATV should achieve substantial penetration of these communities (50 percent or over), the result might be most serious for the new UHF independents in these same areas. This points up a critical consideration—that the nonduplication requirement will be of virtually no assistance, since what is involved is the establishment and healthy maintenance of *independent* stations, and nonnetwork syndicated or film programing is not distributed on a simultaneous nationwide basis. We therefore shall reexamine the fair competition considerations in the context of the present problem—the CATV and UHF trends and the need to develop a policy or procedure because of these trends.

132. A television station normally obtains the right to exhibit nonnetwork programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area and for a particular length of time. This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within some period of time obviously reduces the audience and the value of the program to the station. As we noted, the amount and kind of exclusivity that can be created is restricted by the antitrust laws. But those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process, and this exclusivity is maintained, in large part, through the operation of section 325 of the Communications Act, which forbids the rebroadcasting of any station's signal without the consent of the originating station.

133. We have pointed out how the CATV system presently stands outside of the above program distribution process (pars. 54–55, first report, 38 F.C.C. at p. 704):

> **[The CATV] has not been found subject to the requirements of section 325. [footnote omitted] It does not compete for network affiliation, nor for access to syndicated programs, feature films, or sports events. It is not concerned with bidding against competing broadcasters for the right to exhibit these programs nor with bargaining with program suppliers for time and territorial exclusivity. Moreover, because the distant station whose signal**

is carried has no control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the subject of bargaining or agreement between the distant station and the program supplier—although the question of whether the same program should be rebroadcast in that market by a television station or a translator can be, and often is, the subject of such bargaining and agreement.

This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product—the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all.

134. The anomalies which result from this situation are even more marked in the case of the independent station, particularly in light of the recent CATV trend. Procuring attractive programing which will interest viewers is, of course, the most vital concern of the new UHF independents. For example, such stations may bid for and obtain exclusive rights to an attractive feature film package. No other station in the same market could show these films—but a CATV system, which never entered the bidding, might well bring in these same films from a distant market. If the CATV reaches very significant proportions—50 percent or more, the result is the loss of the exclusive right for which so much was paid and upon which so much may have been staked. And here we stress again that without the financial sustenance from entertainment programs, a station has no adequate economic base to serve as an outlet for local expression for all the people in its service area.

135. When the situation is viewed on an overall basis, rather than from the viewpoint of individual programs, the result is equally anomalous. The CATV seeks to secure as great a number of subscribers as possible in these major markets, aiming for a figure well over 50 percent if possible. Since the people in these markets have three full network services, it seeks to attract such a large number of subscribers, in large part, by bringing in the independent programing of distant big city stations such as the New York or Los Angeles independents. And it obtains such programing by simply paying a common carrier to bring to it the signals of these distant stations (or by itself erecting a tall antenna on an appropriate high elevation to receive the signals and then relay them with suitable amplification along the way to the subscriber). The new UHF station also seeks to attract as wide an audience as possible in these same markets by bringing in attractive nonnetwork programing. But the UHF station cannot, either by means of a common carrier, its own microwave relay, or a tall antenna, decide that the best way to obtain such programing is simply to bring in, in whole or in part, the programing of the New York independents. The established distribution process given congressional recognition in section 325(a), proscribes such conduct. (See letter to Mr. Martin E. Firestone, dated Dec. 16, 1965, FCC 65–1107.)[61] Both the

[61] As another example, in 1965, station KWOA desired to rebroadcast the signal of station WCCO, to present the play-by-play broadcasts of the Minnesota Twins' baseball games. Station WCCO refused rebroadcast consent, largely because it placed a good signal into the area in question. This Commission determined that in view of WCCO's response and the particular circumstances, no action was called for. See letter to Mr. James J. Wychor, dated July 22, 1965.

broadcaster and the CATV thus have the same objective—providing as large a segment of the public as possible in these major markets with access to nonnetwork programs. The question therefore arises why the CATV should operate under one set of competitive rules and the broadcaster under an entirely different set. On its face, this competitive situation would appear to be a most unfair one.

136. Illustrations in the sports area further point up this anomalous situation and are particularly pertinent in view of the importance of sports programing, both to the CATV and broadcasting. The broadcast station (or its network) bids for the right to exhibit sports programing (see, e.g., $37.6 million bid for CBS for the 2-year right to show NFL football games; Broadcasting Magazine, Jan. 3, 1965, p. 124); even then, those rights are at times circumscribed by blackout requirements (during home games), and other conditions permitted by Congress or the antitrust laws. See, e.g., Public Law 87-331. The broadcaster must operate in accordance with these established industry conditions. But the same sports program that is unavailable to the broadcast station is presently made available to the station's audience by CATV systems. In the words of the president and general manager of Wisconsin Valley Television Corp. (AMST comments, attachment B, p. 10, quoting the House CATV hearings on H.R. 7715, p. 415):

> Another serious problem: In Wausau, Wis., because of our proximity to Green Bay, WSAU-TV is blacked out of the Green Bay Packers football games. This I can understand on behalf of the National Football League and the Green Bay Packers * * *. I'm not allowed to carry the games. Any cable system can reach to any area and get these games—some via microwave. Then these games can be moved into WSAU-TV's area. Can our station sit on a Sunday without the football game, while the cable system is running big ads in the local newspaper; "Get total television on cable television."
>
> Now I would like to deliver total television but because of laws and rules and regulations, I'm not able to give total television. The cable system, with no laws, no rules, no regulations, can deliver to my audience, by FCC definition of tower height and power, much more television than I can deliver to them because of the stricture that I must operate under * * *."

137. The answer is sometimes given that the CATV system is simply a master TV antenna, and therefore on this ground should be allowed such different competitive conditions. But this answer does not withstand analysis. A CATV system which proposes to employ microwave to bring in signals 400 or 500 miles away is not a master TV antenna service. It cannot seriously be argued that CATV proposals to bring the New York independents to Dayton or the Los Angeles independents to Dallas-Fort Worth represent master TV antenna arrangements. Nor, whatever its validity in many instances, can the argument appropriately be made when a very tall antenna is employed on a high elevation, with many miles of cable and electronic gear to distribute the distant signals. In any event, the question remains: If the distant signal is freely available for use in the area, as the CATV argues, why is it not just as freely available for use by the broadcast stations in the area (e.g., through a tall antenna on a high elevation). Clearly, however, it is inconsistent with all notions of propriety to say that a Philadelphia or Baltimore UHF station may make whatever use it desires, without permission or payment of the programing car-

ried over the New York independents. See section 325(a), and its legislative history. The result of such "freedom of access" would be gross inequity and chaos.[62]

138. Here again we have reached no final determination but rather have concluded that this is a question warranting thorough exploration in the hearing process. It may be that whatever the disparate conditions for operation, there is no need for concern because the CATV will not significantly affect the development or healthy maintenance of UHF television broadcast service. But as stated we cannot make that determination on the record now before us. It follows that on this ground also, there is need for a procedure pegged to full exploration of the issue in the context of an evidentiary hearing.

3. The major market, distant signal policy, and procedure

139. We have previously found that CATV can make an important contribution to the public interest, and we adhere to that judgment. CATV, along with other auxiliary services, has made a significant contribution to meeting the public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception. It has also contributed to meeting the public's demand for good reception of multiple program choices, particularly the three full network services. In thus contributing to the realization of some of the most important goals which have governed our allocations planning, CATV has clearly served the public interest "in the larger and more effective use of radio." And, even in the major market, where there may be no dearth of service (e.g., Philadelphia, with three full-time network services, and four independent UHF stations either on the air or authorized), CATV may, we recognize, increase viewing opportunities, either by bringing in programing not otherwise available or, what is more likely, bringing in programing locally available but at times different from those presented by the local stations. But this contribution (and related ones such as better reception, etc.) should not be made at the expense of healthy maintenance of UHF operations. We have reached no determination on this critical matter. Rather, we have decided that a serious question is presented whether CATV operations in the major markets may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature. We have also indicated our concern with the relationship, if any, of proposed CATV operations on the large markets and the development of pay-TV in those markets.

140. Our policy and implementing procedure are therefore addressed squarely to these serious questions. The basic thrust of con-

[62] The answer that the CATV does not have a "free ride" in view of the cost of the cable system, misses the point, since the cost of the disseminating system is no basis for exemption from observance of the fundamental distribution process by which the program product is obtained. Both the CATV and the UHF station have substantial costs of construction maintenance and operation. Thus, the most recent UHF station in Chicago, Ill., had a construction cost of about $3,000,000, with substantial estimated yearly operating expenses, including those sums allocated to programing costs. The UHF station cannot appropriate the programing of the New York independents, without consent or payment, no matter what its costs are.

gressional policy in the Communications Act is to resolve such important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop. (Cf. sec. 309 of the Communications Act.) We think that that policy should be applied to this situation. We have determined that we have jurisdiction over CATV necessary to carry out the provisions of the Communications Act (such as secs. 1, 4(i), 303 (h), (g), (r), (s), and 307(b)). It is important, we think, to exercise that jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consistent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest.

141. We shall accordingly follow a procedure whereby the signal of a television broadcast station shall not be extended beyond its grade B into the top 100 major markets (as ranked by ARB on the basis of net weekly circulation of the largest station in the market) by a CATV system which has obtained a franchise for operation in such a market, except upon a showing made in an evidentiary hearing that such operation would be consistent with the public interest, and particularly the establishment and healthy maintenance of UHF television broadcast service. In this way, the Commission will be able to explore in depth the details of the proposed CATV operation, the marketing studies which have been made relating to it (by either the CATV or broadcast groups in the area), the present and potential picture as to television broadcasting in the market, the positions and showings of the interested CATV and broadcast parties, the possible plans or potential of the proposed CATV operation for pay-TV, and other important facets. After such exploration, the Commission will be in a position to make an informed judgment directed to the facts of a particular case.

142. We believe that the procedure which we have adopted is fair and best suited to promote the public interest, taking into account both the development of the broadcast and the CATV industries. It is in line with the urging of several parties that what is needed is full evidentiary hearing. While the hearing urged has usually been one of an overall nature, we believe it best to consider these important matters in the context of the particular request and the particular situation.

143. We recognize that the evidentiary hearing may consume some significant period of time. But as stated, the public interest requires thorough exploration of the very important issues raised; they cannot be sloughed aside or the answers lightly assumed. Further, the requirement for an evidentiary hearing has been confined to the top 100 markets, where there is generally no dearth of service and new UHF services are coming on the air. For example, in Philadelphia, there are three VHF network affiliated stations, three UHF inde-

pendents on the air, with a fourth authorized. In the markets below 100, where there may be a greater present need for additional television service, the general *requirement* for evidentiary hearing is inapplicable. See paragraph 146, infra.

144. We have selected the top 100 markets for special attention because it is in these markets that UHF stations or wire pay-TV based upon CATV operations are most likely to develop and therefore the problems raised are most acute.[63] Further, as noted, any delay in commencement of CATV operation because of the necessity for evidentiary hearings is mitigated by the consideration that these markets generally have a considerable amount of presently available and prospective new service. Finally, the top 100 markets include roughly 90 percent of the television homes in this country. Our policy therefore focuses on the critically important areas.

145. Admittedly, there can be substantial problems affecting the public interest where the CATV system proposes to extend the signals of broadcast stations beyond the grade B contour into areas below the top 100 markets. But there are differences between the two situations which call for different procedures. In markets below the top 100, the independent UHF (or VHF) station is much less likely to develop; the stations in such markets are apt to be three or less in number and network affiliated. This means, in turn, that the nonduplication provision is effective (since network programing will be significantly involved), and protection of a station's network programing should contribute very substantially to insuring its continued viability. It would appear that network programing will continue to be available in such markets; in the unlikely event that such programing becomes unavailable because of CATV impact, there would appear to be other appropriate remedial action which can be taken. Further, it is in the markets below 100 that there may be underserved areas where CATV can make its most valuable and traditional contribution. Indeed, the market division which we adopt is really a division between CATV in its traditional sense and the new, revolutionary facet of CATV, as posed by its entry into the major markets. It is the latter which peculiarly requires the most thorough examination in the context of an evidentiary hearing.

146. We think, therefore, that a fair compromise is to draw the line as to special attention (i.e., evidentiary hearings) at the 100th market, and below that point, simply to take such action as may be

[63] Some question may arise as to whether a particular system is located in a market coming within the top 100. For clarification, we have specified that the above provisions are applicable to a CATV located in a community coming within the predicted grade A contour of any station in one of the top 100 markets. We have employed the grade A contour of any station since, while stations often are located at different sites or have different powers or heights (and thus different A contours), these grade A service areas in the same market have a tendency of becoming fairly close to one another over a period of time. In any event, we think that this is an appropriate criterion since it encompasses the essential area upon which new UHF broadcast operations in the market would be based, without including the much larger areas falling within the grade B contours, as has been urged by some in this proceeding. Because our effort is to carve out such an essential area upon which new UHF development would be vitally based, we have employed the predicted grade A contour; use of the predicted contour should also have the advantage of definiteness and easier administration. In the unusual instance where the requirement may be inappropriate, waiver can be sought. Where a CATV system is located within the top 100 markets when a hearing is commenced, the hearing will be continued even if these markets change in a subsequent ARB rating. We note that the 1965 ARB listing makes no change in the 1964 listing of the top 100 markets except as to relative standing within the 100.

necessary in the public interest, upon appropriate petitions bringing substantial questions to our attention. See paragraph 98. We shall not necessarily hold evidentiary hearing in connection with such petitions in the smaller markets. Such hearings could be a considerable burden both upon the CATV operation and the broadcaster in these small communities. See paragraph 78, first report, 38 F.C.C. at page 714. Indeed, the hearing might thwart the initiation of needed service. Therefore, while hearings might be held in some instances, we have devised flexible procedures generally to treat expeditiously petitions or requests involving the markets below 100, since we recognize that to hold hearings upon each such petition or request might be burdensome to all parties involved and to the public.[64]

147. *The question of grandfathering.*—On February 15, 1966, we issued a public notice giving the essence of our determination in this respect. Systems not yet in operation on February 15, 1966, and proposing to extend the service of a station beyond its grade B contour into one of the top 100 markets will come within the scope of our major market procedure, and must make the necessary showing in an evidentiary hearing. In view of the very great desirability of avoiding the disruption stemming from action applicable to an operating system and the strong public interest considerations underlying our policy, we think good cause exists for immediate effectiveness of the major market rules upon their publication, as suggested by some of the parties. A line must be drawn as to "grandfathering," and we believe it appropriate to do so upon the basis of operation on the date of the public notice. A system which has gone into operation by extending signals beyond their grade B contour to subscribers in the top 100 markets for the first time after that date, would be subject of a cease-and-desist proceeding.[65] Since we shall not "grandfather" systems coming into operation after February 15, 1966, the effectiveness of our action, practically speaking, is geared to that date. We could follow normal procedure and wait until 30 days after publication in the Federal Register to proceed against systems commencing operation after February 15, 1966, in the top 100 markets. But we do not believe that this hiatus would serve any useful purpose or the public interest. For, in the interval, a system might commence operation after the February 15 date and make "drops" to a significant number of subscribers, all of whose CATV service could be ended when the Commission instituted cease-and-desist proceedings as to the CATV operation. In the circumstances here, where "grandfathering" is pegged to the February 15 date, we think that orderly procedure and the desirability of avoiding disruption as much as possible call for immediate Commission action,

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[64] As previously stated (n. 51, first report, 3 F.C.C. at p. 715), we will, as required by the Communications Act and consistently with its procedural specifications (e.g., sec. 309), examine any question raised in connection with individual microwave applications which bears on the public interest in the particular applications involved.

[65] We recognize that this may catch some systems just prior to the commencement of operation. But this will always be true in the case of any policy in this area, and in any event, if the policy is to be effective and achieve the above described goals, it must be implemented immediately. We also point out that parties have known of the Commission's proposals for a major market procedure since Apr. 23, 1965 (and of the counterproposals since July 26, 1965). The notice expressly "* * * put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not" (notice, par. 65, 1 FCC 2d at 477). Finally, in the unusual case, we can consider the matter upon petition for waiver.

rather than the Commission waiting passively on the sidelines for the 30-day period to expire. Good cause therefore exists to make the rules as to the major market procedure effective upon publication, so that we may proceed forthwith against any system operating in contravention of those rules.[66]

148. The essential purpose of our policy is to take hold of the future—to insure a situation where we or the Congress, if it chooses, can make the fundamental decisions in the public interest upon the basis of adequate knowledge. So far as the application of our major market distant signal policy, we do not intend to disrupt the existing situation, by withdrawing from any CATV subscriber any signal which he was receiving as of February 15, 1966, in the top 100 markets or which he is presently receiving in other markets.[67] Based on our experience, we regard such a withdrawal as impractical and, in any event, we note that we have not made any basic policy judgment which would warrant such undue disruption. We therefore shall "grandfather" all systems which were in operation upon February 15, 1966 (the release date of the above mentioned public notice), to the extent that such systems need not make the showing in section 74.1107 to continue to carry to subscribers signals beyond their grade B contour, which were being supplied to those subscribers on that date. But any addition of a new distant signal on an existing system in the top 100 markets would come within the major market policy.

149. The foregoing dealt with grandfathering. We turn now to the question whether systems extending signals beyond their grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographical areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing).[68] While there may be a disruptive factor in halting CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, appropriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the

[66] Similar good-cause grounds are applicable to the provision of the rule dealing with markets ranked below the 100th (74.1107(c)), since the public interest would not be served by permitting situations to continue to develop which raise substantial questions and may result in either disruption of service or inability to take an otherwise desirable action because of the factor of disruption. We shall also make effective upon publication the procedural provisions (secs. 74.1105, 74.1109) which relate to sec. 74.1107.

[67] As to the application of our carriage and nonduplication rules, see pars. 49, 68, 106.

[68] And certainly where a new franchise or amendment of an existing franchise after Feb. 15, 1966, to operate or extend the operation of the CATV system in the same general area is involved, the requirement of an evidentiary hearing will be applicable.

geographical extension of the CATV system to new areas, and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and responses in the particular case, whether such temporary relief is called for, and if so, its nature. In view of the nature of the problem, the Commission will give expedited treatment to petitions in this area. Finally, we wish to stress one important facet: We have previously put all parties on notice as to the pendency of our proposal and have now put parties on notice that there should not be expansion of major market systems from a few thousand subscribers to a very substantial number of subscribers until resolution of the public interest issues posed. We expect CATV operators to heed this notice and not to attempt to circumvent orderly consideration of any petition in this respect by an extraordinary effort to wire up the community or a substantial portion of it. In any event, we are requiring the submission of data showing the extent of construction of the system as of February 15, 1966. While we expect the ordinary wiring operations to have continued since that date, any extraordinary wiring efforts or entry into patently new geographical areas (e.g., extension of a system from a suburb into the main community) will be at the risk of the system and will not be accorded weight in the judgment to be made.

150. As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as the experience indicates. The present rules are our best judgment of what the public interest now calls for. We recognize that they may not perfectly fit every situation, and repeat that should they be inadequate or unduly burdensome in individual cases, special action or waiver can be obtained upon an appropriate showing. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192.

151. Finally, we stress that the rules do not halt CATV service or growth. With the possible exception of the applicability of our carriage rules (see par. 66), the CATV viewing public will not be deprived of any distant signal service which it was receiving as of February 15, 1966. CATV will not be precluded from bringing new service to underserved areas or from bringing better reception in cities such as New York. With possibly only the rarest exception, CATV activity which does not involve extension of a signal beyond its grade B contour may freely continue.[69] CATV expansion into markets below the top 100 may also continue and will be the subject of Commission scrutiny only upon petition in a particular case. Thus, we have confined our special attention to the area of most concern—the top 100 markets where UHF stations are most likely to be coming into existence. And, in line with our present general policy in dealing with microwave applications (see par. 49, notice, 1 F.C.C. 2d at p. 471),

[69] If two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise.

we have specified no "freeze" but rather a full exploration of the facts of each case, so that we may make an informed judgment on this most important question. We believe that this is a reasonable way to proceed, and that the public interest requires no less a procedure.

152. *Legislative proposals.*—The foregoing discussion treated matters in part I and paragraph 50 of the notice of proposed rulemaking. The remaining matters in part II of the notice will be considered on the basis of the comments filed in that part and the experience gained. For the reason also, this report is designated as the second report. We turn now to a brief discussion of the legislative proposals which we believe are desirable.

153. There are four areas which we shall urge to the Congress as particularly warranting its attention:

(i) As we stated in the notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome congressional guidance as to policy and congressional clarification of our authority in all respects in this field. See notice, paragraph 31, 1 FCC 2d at page 465.

(ii) We believe that congressional consideration of the pay-TV aspects of CATV is particularly called for. For the reasons stated in paragraphs 128–129, we shall urge that Congress prohibit the origination of program or other material by a CATV system, with such limitations or exceptions as are deemed appropriate. A hybrid CATV-pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals, and such use of the broadcast industry's signals would appear to be both inequitable and inconsistent with the public interest. It is inequitable because it is clearly unfair to use the broadcast industry's product as a basis for wire-pay-TV operation which could adversely effect that industry or indeed supplant it. More important, were wire-pay-TV to supplant free television broadcast service, it would be inconsistent with the public interest, since it would mean that the public would receive, at least in large part, the same service it now does, but for a fee. Finally, we are considering petitions seeking the authorization of pay-TV in the broadcast spectrum.

(iii) We believe that Congress should consider whether there should be a provision similar to section 325(a) applicable to CATV systems (i.e., whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system). We have described the presently anomalous conditions under which the broadcasting and CATV industries compete. See paragraphs 131–138.[70] Several parties

[70] The problem is further pointed up by the recent controversy involving the telecasting of certain of the Notre Dame home or away games by station WNDU–TV, South Bend, Ind. See letter to Mr. Asa S. Bushnell, dated Oct. 28, 1965, public notice, dated Oct. 29, 1965, mimeo 75429. Under the NCAA television regulations, the station was allowed to telecast such games, but permission to do so was temporarily withdrawn because CATV systems, without WNDU–TV's consent, would then pick up the station's signal and carry it to areas not coming within the regulations. The NCAA television committee, while it is continuing to study the matter, recently adopted a new regulation stating:

"Any televising privilege granted under article XIII (a or b), or XV shall apply exclusively to the station or stations specified, and shall be limited to such station or stations. Any extension of such an authorized telecast or its stipulated area of coverage by means of commercial microwave, cable, or community antenna television operation shall be construed as a violation of the rights accorded, and shall preclude favorable consideration of further authorizations of this nature. (Report of the 1965 NCAA television committee, Jan. 10–12, 1966, p. 31)."

Under this unusual situation, the local broadcast station could lose the opportunity to present a program of great interest to its area (as the NCAA plan recognizes in its regulations), because CATV systems over which it has no control carry the program beyond the specified local area (conceivably for hundreds of miles).

Indeed, the anomalous conditions could have an adverse effect on development of new program sources. Multiple owners such as Westinghouse or Metromedia have undertaken some development of new programs; this endeavor promotes the public interest by increasing the programs available and diversifying their sources. But, as Westinghouse points out, the undertaking is a difficult one, which might not be sustained if the programs are brought into the major markets by CATV systems of significant size or impact, thus diminishing or ending the opportunity for the sale of the programs in these markets. The same consideration might be pertinent in the case of the development of a fourth network.

such as NBC have urged that a section 325(a) approach would obviate the need for much, if not all, of the Commission regulations in this area and would serve the public interest. We are not in a position to state whether a section 325(a) approach would be effective and fully consistent with the public interest. We think that this is a matter warranting congressional (and Commission) consideration, including such aspects as how a "retransmission consent" requirement would function as a practical matter, whether systems in small communities should be dealt with specially, and whether grandfathering is appropriate and the nature of any such grandfathering.

(iv) Finally, Congress will be asked to consider the appropriate relationship of Federal to State-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

CONCLUSION

154. Authority for adoption of these rules is contained in sections 1, 4(i), 303, 307(b), 308, and 309 of the Communications Act. We wish to stress particularly the provisions of section 1 that the general purpose of the act is to "maintain the control of the United States over all the channels of interstate and foreign radio transmission * * * under licenses granted by Federal authority"; of section 303(h), "to establish areas or zones to be served by any station"; of section 307(b), to make "a fair, efficient, and equitable distribution of radio service" among the several States and communities", section 303(g), to study new uses of radio and generally encourage the larger and more effective use of radio in the public interest, and section 303(s), the "all-channel receiver" section. The rules we adopt here, under the rule-making power bestowed upon the Commission in sections 4(i) and 303(r), are designed to "study new uses" and insure future CATV activity and growth consistent with the "larger and more effective use of radio in the public interest." Indeed, the type of situation here involved is the very reason for the creation of this agency as the history of early chaos in the radio field shows. As the Supreme Court has stated, the Communications Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control a grip on the dynamic aspects of radio transmission" (*FCC* v. *Pottsville Bctg. Co.*, 309 U.S. 134, 138; see also *NBC* v. *U.S.*, 319 U.S. 190).

155. In this connection, we stress that we are not committed to the status quo—to protecting existing investment against new technological advances. The whole history of this art has been one of great change, from radio to television to perhaps tomorrow satellite broadcasting or laser communication. It may be that CATV, if allowed full unfettered growth, would prove to be an excellent supplement, bringing additional service and diverse programing to millions of people in built-up areas who can afford it, without detriment to the provision of additional local broadcasting service to the entire Nation. If so, the information obtained in the hearing process will provide that indication, and will be the basis for authorizing such growth. But we cannot make that judgment in the record now before us—and, instead of the above picture of wire television as an excellent supplement, there is the possibility that the Nation might find itself with a system half wire, half free, which is destructive of the larger goals of additional networks, additional outlets for local expression, and which provides increased service to some in the city at

the expense of those in the rural area or those who cannot afford to pay. It is, we think, time to get the facts, and in light of the service presently available, there is time to get the facts.

156. Accordingly, *It is ordered*, This 4th day of March 1966, that the rules contained in the attached appendix D are adopted, effective April 18, 1966; *Provided, however*, That the provisions of section 74.1103 are not effective as to existing operations of nonmicrowave CATV systems until 60 days thereafter, and provided further that the provisions of sections 74.1105, 74.1107, and 74.1109 are effective immediately upon publication in the Federal Register.

It is further ordered, That pursuant to section 403 of the Communications Act, all CATV systems in operation on April 18, 1966, shall within 30 days thereafter file with the Commission the information described in paragraph 99 of this report.

It is further ordered, That the proceedings in docket No. 15971 *Are not terminated* and that, in light of the comments on part II of docket No. 15971 and/or such further proceedings as the Commission may order, amendments may be made to the rules set forth in the attached appendix C or additional rules may be adopted.

It is further ordered, That the proceedings in dockets Nos. 14895 and 15233 *Are terminated*.

APPENDIX A

Comments and/or reply comments on part I and paragraph 50 of this proceeding were filed by:

AFL–CIO affiliated labor organizations
Allied Artists Television Corp.
American Broadcasting Co.
American Cable Television, Inc.
American Farm Bureau Federation
American Telephone & Telegraph Co.
Aroostock Broadcasting Corp.
Association for Competitive Television
Association of Maximum Service Telecasters, Inc.
Black Canon Broadcasting Co.
Bonneville International Corp.
Clearview of Georgia, Inc.
Columbia Broadcasting System
D. H. Overmyer
Entron, Inc.
Eastern Educational Network
Fuqua Industries, Inc.
G. T. & E. Service Corp.
Houston Post Co.
International Telemeter Corp.
Jack O. Gross, d/b/a Gross Broadcasting Co.
Jerrold Electronics Corp.
Journal Co.
Joint comments of stations KHOU–TV, KOTV, KXTX, WANE–TV, WAVE–TV, WFIE–TV; WFRV, WISH–TV, WJXT, WMT–TV, WNOK–TV, WTOP–TV
Meredith Broadcasting Co.
Mesa Verde Broadcasting Co., Inc.
Micro-Relay, Inc.
Midwest Television, Inc.
Mobile Video Tapes, Inc.
National Association of Broadcasters

National Association of Educational Broadcasters
National Broadcasting Co.
National Community Television Association, Inc.
National Educational Television
National Farmers Union
National Grange
Phillips, Nizer, Benjamin, Krim & Ballon
Rogers TV Cable, Inc,
Rust Craft Broadcasting Co.
San Diego Telecasters, Inc.
Smith & Pepper (on behalf of over 150 CATV systems)
Snyder & Associates
Springfield Television Broadcasting Corp.
Storer Broadcasting Co.
Superior Broadcasting Corp.
Taft Broadcasting Co.
Telerama, Inc.
Triangle Publications, Inc.
Tri-State TV Translator Association
Trans Video Corp.
TV Cable Service of Abilene, Inc.
U.S. Independent Telephone Association
West Central Broadcasting Co.
Westinghouse Broadcasting Co., Inc.
Western Slope Broadcasting Co., Inc.
WGAL Television, Inc.
WJAC, Inc.
WKBH Television, Inc.
WTVY, Inc.
William L. Fox

APPENDIX B

SUMMARY OF COMMENTS ON PARAGRAPH 50

National Community Television Association (NCTA) urges that a rule along the lines of the policy adopted in paragraph 49 and proposed in paragraph 50 is "completely arbitrary," "unnecessary," and "would be a virtual prohibition to provide CATV service in such communities (NCTA comments, pp. 13–14). By way of support NCTA quotes at length (NCTA, exhibit B, pp. 14–22) from the discussion in the Seiden report concerning "CATV in Three-Station Markets" (pp. 84–86) and from the Fisher report concerning the effect of noncarriage on audience and revenues where there are three or more off-the-air program alternatives (pp. 91–92). NCTA states that the Seiden and Fisher conclusions "show conclusively that there is absolutely no basis for allegations of CATV as an adverse factor in the potential development of UHF television in large cities" (NCTA, exhibit B, pp. 22, 32). NCTA asserts further that there is no criterion for determining whether a CATV system might at some time have the effect of delaying construction of a UHF station in a three-station market (NCTA comments, p. 14, exhibit B, p. 31). Finally, it states that the existence of a CATV system in a community has not in the past prevented construction of a successful VHF or UHF television station in the community (ibid.).

Other comments on behalf of CATV interests challenge the proposed paragraph 50 rule principally on the ground of alleged lack of jurisdiction over CATV systems. It is asserted in addition that CATV will help UHF by providing good quality reception to an immediate audience prior to all-channel set saturation. Because of this, some UHF permittees in major cities have indicated no objection to CATV entry. It is further asserted that the success of independents will ultimately depend on their ability to provide a program service which will attract viewers and advertisers. International Telemeter Corp. states that if and when CATV systems are established on a broad base in large metropolitan areas, they may well be utilized for pay-TV operations as an adjunct to other forms of wire television (Telemeter reply comments, p. 11). But, Telemeter adds (ibid.), "this is not to say that the public interest will not be served by the result * * *": "the multiplicity of services via wire television systems can only serve, not harm, the public interest."

The comments of the American Broadcasting Co. (ABC) support the proposal. ABC states that a CATV operator in a market such as Philadelphia could carry the several New York independents to the very serious detriment of the local Philadelphia UHF stations, and that the carriage and nonduplication rules presently adopted by the Commission are not truly responsive to the "unexpected fractionalization of the audience interested in independent programing." ABC therefore believes that the Commission should "establish the areas or zones" normally to be served by television stations and delineate the circumstances under which a station's signals may properly be brought to areas not within its normal service area. It asserts that interim rules, pending the adoption of final rules in part II, are needed because once CATV systems are established in markets that have a potential for independent UHF station development in the reasonably near future, the Commission will find itself in the impossible position of trying to undo what has already been done—of possibly adopting a regulation which would deny to substantial numbers the service which they assumed they would receive and for which they have already paid. ABC therefore urges the adoption of a rule prohibiting any person from transporting the signal of a TV station beyond its grade B contour into a community within the range of four or more commercial grade A assignments and receiving grade A or better service from three or more commercial TV stations (or two such stations with a third station already authorized). ABC states that such a rule would apply basically to all but three of the Nation's top 100 markets and therefore to those areas which now or shortly will have three or more local network services and the reasonably immediate likelihood of a fourth commercial service; that with this amount of service, these areas do not have any pressing need for additional service via wire, and they are also the areas which hold the most possibilities for UHF development; that the interim procedure would insure that a significant pay-TV service would not be established while the Commission is reaching its final decision in this proceeding and in the pay-TV rulemaking proceeding that has recently been requested; and that at the same time, the interim procedure will not preclude the development of CATV in these relatively underserved areas where it serves as a needed adjunct to free television service. Above all, ABC stresses that the proposed rule will prevent the establishment of CATV systems in areas and under conditions which the Commission may ultimately conclude would inhibit or prevent the normal development of UHF television.

Westinghouse in its comments takes a position similar to that of ABC. It urges a restriction upon the importation of signals into communities situated within the grade A coverage of four or more commercial TV assignments and communities within the grade A coverage of three or more commercial stations actually in operation (with exceptions (i) for two station markets with an outstanding construction permit for a third station where such permit is not activated within 6 months, and (ii) to areas within the grade A coverage of three stations not receiving the full service of the three networks because of the existing network affiliation relations). It asserts that many applicants for CATV franchises in big cities today are promising to deliver such stations as WOR–TV and WNEW–TV, New York, and WGN–TV, Chicago; that these are well-established, independent stations in major markets, and, compared with a UHF station just getting started in another city, have a much greater economic base to make major expenditures for programing; and that the local UHF station, competing with these major stations for what is at best a limited audience (i.e. the audience for nonnetwork programing), will be unable to get a large enough share of this audience necessary for it to produce the income needed for the station to buy programing with which it can *in fact* compete for viewers with the other stations on the system. It states that CATV only brings its service to some viewers—those fortunate enough to live in areas with a large enough local population to furnish an economic base for the laying of CATV cable, and then only those living in such areas who can afford to pay CATV fees. Westinghouse asserts that CATV in big cities also has the obvious potential of transforming itself into pay-TV, and points to recent news reports that tell of a company which was unsuccessful in its efforts to operate a pay-TV system in one city in Canada and is now planning to take over a successful major CATV system in another Canadian city and convert it to pay-TV in whole or in part. Finally, Westinghouse stresses the need for an interim rule, stating that once CATV franchises are granted in the larger markets and construction of the systems

is commenced pursuant to those grants, the Commission, from a practical and political viewpoint, will have lost effective control of the situation in those areas.

Storer Broadcasting Co. also supported the proposal because, it asserts, there is a definite probability of serious impact on television development in such cases, and the Commission cannot, through inaction, permit events to occur which jeopardize the goals set by the Congress and the Commission looking toward a competitive nationwide system of intermixed local television facilities. It urges that there is an established immediate need to "hold the line," during the interim period, on importation of distant signals to the major markets where CATV's "present stampede" into these markets might destroy the independent stations' audience potential "through importation of competitive programing on unequal terms" (Storer comments, p. 12). Storer also states that if the policy is to be effective, it should be applied to affiliated as well as independent UHF stations, and that it should be extended to CATV systems in nearby communities upon which the UHF depend for audience circulation. It asserts that a UHF station, although nominally a network affiliate, may still rely largely on independent programing, and that therefore its development requires the same protection as that proposed for independent UHF operators; and that CATV systems in nearby communities "can impose drastic damage on that station's audience circulation, particularly on a cumulative basis." (Id. at p. 14.)

The Association of Maximum Service Telecasters (AMST), Midwest Television, Inc. (Midwest), and the joint comments of KHOU–TV, KUTV, KXTX, WANE–TV, WAVF–TV, WFLE–TV, WFRV, WJXT, WMT–TV, WNOK–TV, WTOP–TV (joint comments) all urge the adoption of interim procedures going beyond those proposed in paragraph 50. The factual basis of AMST's and Midwest's comments have been described in part (see pars. 31–41). In addition, AMST cites the experiences of the UHF station in Lock Haven, Pa., and of UHF station WRLP, Greenfield, Mass., in the face of CATV competition. AMST asserts that the importation of outside large city independent television stations by CATV will be an obstacle to the development of a fourth network, since it will jeopardize the development of the UHF stations in these cities. AMST also states that the entry of CATV into larger cities poses a substantial threat to the development of network UHF service, citing in support statements made to the Commission or to the Congress of Rust Craft Broadcasting Co., permittee of WJKS–TV, Jacksonville, Fla., and WCCB–TV, a new UHF station in Charlotte, N.C., Midwest describes the explosive growth of CATV in the Peoria-La Salle area, the Springfield area, the Champaign-Danville area, the WCIA service area generally, and the San Diego area (see pars. 34, 39–41). The joint comments assert that proposals to bring multiple distant signals into areas such as Fort Wayne, Ind., Columbia, S.C., Jacksonville, Fla., and Indianapolis, Ind., jeopardize or foreclose the development of new UHF stations in these areas. The joint comments point out that in the area served by the existing Sacramento-Stockton stations, CATV systems have been franchised or have commenced operations in at least 31 communities, and applications for franchises have been filed or proposed in at least 18 more—including Sacramento and Stockton themselves; that the total number of households in these cities and communities is more than 250,000, representing a major portion of the audience now served by the three existing Sacramento-Stockton commercial stations and a still more substantial portion of the audience which would be served by KPXL, the newly authorized UHF station on channel 29 in Sacramento; that as the permittee for the new UHF station in Sacramento has informed the Sacramento City Council, the importation of outside signals from San Francisco-Oakland and Los Angeles stations, as proposed, would make it impossible for the new UHF station to survive.

AMST, Midwest, and the joint comments propose the interim rule that no CATV system shall be permitted to extend the signal of any television broadcast station beyond its grade B contour except upon a clear and full showing, (*a*) that there are special circumstances, for example, that the community is remote and isolated and does not have, and cannot be expected, to receive in the future, direct off-the-air local or area television service; and (*b*) that the operation of the CATV system, taken together with the operations of all other CATV systems operating or franchised or which are being proposed in the area in question, would not pose a substantial threat to the maintenance or the expansion of any existing UHF station or the development of new UHF service

in the area. AMST urges that the foregoing rule should be made effective immediately upon its publication and should be made applicable to all CATV systems proposed on or after April 23, 1965, the date of the release of the Commission's first report and order and its notice of inquiry and notice of proposed rulemaking. It states that an alternative but much less satisfactory approach in view of the CATV activity since April 23 would be to apply the interim rule, (*a*) to all CATV systems which become operative on or after the publication of the rule, regardless of the date of franchise, and (*b*) to any CATV system operating on the date of publication of the rule which thereafter substantially expands its lines or the number of its subscribers or which increases the number of stations carried.

In reply comments ABC and Westinghouse assert that their interim proposal would better serve the public interest because it has been designed to prohibit the development of CATV in areas where it could adversely affect the overall public interest but not to prohibit its development where it could have little adverse effect upon the public interest and where there may well be a substantial public need for CATV services. In its reply, AMST asserts that its interim procedure would not have the effect of being a complete ban on CATV; that it would leave untouched the further expansion and development of CATV in its historic functions—(*a*) the providing of service to communities that are remote and isolated and do not have, and cannot be expected to receive in the future, direct off-the-air local or area television service, and (*b*) the providing of fill-in service, improving the off-the-air service of local and area television stations in pockets within their normal coverage contours where for terrain or similar reasons a desirable quality of service is not received. It further argues that if there are indeed situations in which a CATV entrepreneur can show that he will aid rather than threaten the maintenance or expansion of existing UHF stations and the development of new UHF service, appropriate interim rules and policies will leave it open to the CATV entrepreneur to make such a showing. AMST urges that the ABC and Westinghouse interim procedure are inadequate because they seek at the most to protect only those communities or areas which could utimately have *four* television stations; that even as to those communities or areas, three television stations must already be active or two must be active and the third imminent; and that the proposed rule would apply only in the grade A contours of those existing or imminent stations. AMST states that there is no reason—*at least* in the interim—to allow CATV to retard UHF development in *any* market. And that it is entirely possible for CATV systems in dozens of small communities to blanket most of the audience potential in the station's service area beyond its grade A contour; and that the area can thus be very effectively denied to a small UHF station—possibly the difference between survival and failure, and at least the difference between effective programing and ineffective programing.

APPENDIX C

COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151) states that the purpose of the act is the regulation of interstate and foreign commerce in communication by wire and radio, and that to efficiently achieve this purpose, authority over such commerce is centralized in the Commission. Section 2 (47 U.S.C. 152) states that the "provisions of this Act" shall apply to "all interstate communication by wire or radio * * * and to all persons engaged within the United States in such communication * * *." These terms are defined in section 3 of the act. Section 3(a) defines wire communication as the "transmission of * * * pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission." Section 3(b) defines communication by radio as the "transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by wire *

radio. They transmit "pictures, and sounds * * * by aid of wire" and are "instrumentalities * * * [used for] * * * the receipt, forwarding, and delivery of communications * * * incidental to such transmission," and hence fall within the definition of wire communication under section 3(a).[1] Moreover, CATV systems constitute *interstate* communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which "is now well established * * * as interstate communication." *Capital City Telephone Co.*, 3 FCC 189, 193 (citing *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266).[2] The law is clear that the mere location of communication facilities wholly within one State does not establish that the communication service rendered over such facilities is an intrastate service, and that a communications service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one State. *California Interstate Telephone Company* v. *F.C.C.*, 328 F. 2d 556 (C.A.D.C.); *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Pacific Telatronics, Inc.*, FCC 64-1180, 4 R.R. 2d 145 (1964). CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, *Clarksburg Publishing Co.* v. *F.C.C.*, 225 F. 2d 511, 517 (C.A.D.C.), and hence constitute "interstate communication by wire" to which the provisions of the act are applicable (secs. 2(a), 3(a*f*). See *American Trucking Association* v. *United States*, 344 U.S. 298, 311.[3]

With respect to the Commission's authority to adopt the rules proposed in the notice of inquiry and proposed rulemaking, i.e., the "provisions of [the] act" that are to be applied to CATV systems, there are the following sections: Sections 1, 4(i), 303 (f), (h), (p), and (r), 307(b), 315, 317, and 508. But the crucial sections would appear to be 1, 307(b), 4(i), and 303 (f), (h), and (r). As the notice and the report and order in dockets Nos. 14895 and 15233 make clear, the existence and growth of CATV systems threaten to impede realization of the Commission's television assignment plan and policies under sections 1 and 307(b) (i.e., the sixth report and order).[4] See *Carter Mountain Transmission Corp.* v. *F.C.C.*, 321 F. 2d 359 (C.A.D.C.), *cert. den.* 375 U.S. 951 (1963). The Commission has authority under sections 4(i), 303(f), 303(h), and 303(r) to—

> perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions (4(i));
> make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act * * * (303(f));
> establish areas or zones to be served by any station (303(h));
> make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this act * * * (303(r)).[5]

The foregoing provisions (4(i), 303(f), 303(h), and 303(r)) give the Commission broad rulemaking authority to carry out the provisions of this act (e.g.,

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[1] It can be argued that CATV systems, in receiving, forwarding, and delivering the station's signal to the viewing public, are the instrumentalities incidental to the transmission of the signal and hence fall within the definition of "communication by radio" in sec. 3(b). However, it is unnecessary to consider this argument in view of the discussion above as to sec. 3(a) and the scope of the Commission's proposals. Since CATV operations clearly fall within sec. 3(a) and/or sec. 3(b), a determination of their precise status is not essential to the question of the Commission's jurisdiction to proceed as proposed in the notice of inquiry and proposed rulemaking.

[2] Congressional approval of the *Capital City* doctrine was expressed in connection with the 1960 amendment to sec. 202(b). See 105 Congressional Record at 6256.

[3] It is, we believe, significant that, in sustaining the jurisdiction of the Interstate Commerce Commission in *American Trucking* the Supreme Court relied solely upon provisions of the Motor Carrier Act that are, in the circumstances, analogous to secs. 2 and 3 of the Communications Act. Compare 49 U.S.C. 302(a) and 303(a)(19) with 47 U.S.C. 152 and 153 (a) and (b).

[4] In addition, as noted in the notice, there exists the potential to frustrate the purposes of the act embodied in secs. 303(p), 310, 315, 317, and 508 (and certain Commission regulations).

[5] Secs. 303 (f), (h), and (r) are preceded by the following clause:
"Except as otherwise provided in this act, the Commission from time to time, as public convenience, interest, or necessity requires shall * * *."

secs. 1 and 307(b)) with respect to communications or persons coming within the Commission's jurisdiction (including CATV—sec. 2(a)). Section 303(h), in particular, was affirmatively designed to assist the Commission in effectuating the fair and equitable distribution of broadcast service called for by section 307(b).[6] The Commission's authority to issue rules establishing the area or zone to be served by any station for this purpose includes the power to prevent infringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act). Hence, it clearly encompasses, we believe, the authority to prescribe by rule the conditions under which the station's signal may be extended beyond the area or zone to be served by the originating station, by means of CATV—an "interstate communication by wire" to which the act's provisions are applicable (secs. 2(a) and 3(a)).

Moreover, apart from section 303(h), the general rulemaking power of the Commission (secs. 4(i) and 303(r)) includes authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) by CATV. In *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 215–220, the Supreme Court citing, *inter alia*, sections 1, 303(f), and 303(r), stated that:

> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio * * * In the context of the developing problems to which it was directed, the act gave the Commission not niggardly but expansive powers.

Under such "expansive" and "comprehensive" powers,[7] the Commission has authority to take reasonable and appropriate action, including promulgation of rules, "as may be necessary" to carry out the provisions of section 307(b)—to insure that the regulatory scheme embodied in that section (the equitable distribution of service) and section 303 is not frustrated by the operation of CATV, an "interstate communication by wire" to which the act's provisions are applicable. This authority does not depend on a specific reference to CATV or CATV practices in the act. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203. See also, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 218–219, where the Supreme Court stated:

> True enough, the act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic * * *. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalog of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.[8]

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[6] Sec. 303(h) was copied from the Radio Act of 1927 and originated in preceding bills to amend the Radio Act of 1912. For the legislative intent, see hearings on H.R. 5589 before the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st sess., pp. 40–41.

[7] See also, *Stahlman* v. *F.C.C.*, 126 F. 2d 124, 128 (C.A.D.C.). For the intended comprehensive scope of Commission authority see, e.g., the following legislative history of the Radio Act of 1927, which was reenacted in all substantial respects in the Communications Act of 1934 (78 Congressional Record 8822–8823, 10313–10314, 10990); 66 Congressional Record 5479; S. Rep. 772, 69th Cong., 1st sess., pp. 2, 3.

[8] The Court, in referring to provisions of the act such as secs. 303 (g) and (r), stated (319 U.S. at 217–218):

"These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' We cannot find in the act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of its

To the same effect in other fields, see *Houston, East and West Texas Railway Co.* v. *U.S.*, 234 U.S. 342; *U.S.* v. *Wrightwood Dairy Co.*, 315 U.S. 110; *U.S.* v. *Pennsylvania R. Co.*, 323 U.S. 612; *American Trucking Assoc.* v. *U.S.*, 344 U.S. 298; *Public Service Commission of State of New York* v. *Federal Power Commission*, 327 F. 2d 893, 897 (C.A.D.C.).[9]

The *American Trucking* case is particularly pertinent. The Supreme Court there sustained ICC rules "aimed at conditions [trip-leasing] which may directly frustrate the success of the regulation undertaken by Congress." After citing sections analogous to section 307(b) in our situation, the Court stated (344 U.S. at 311):

> Included in the act as a duty of the Commission is that "to administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulation, and procedure for such administration." And this necessary rulemaking power, coterminous with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation" regulation of which is vested in the Commission by 202(a). See also 203(a)(19).

We point out that section 204(a)(6) of the Motor Carrier Act is substantially similar to sections 303(r) and 4(i) of the Communications Act; while in the circumstances, sections 202(a) and 203(a)(19) of that act are closely analogous to sections 2(b) and 3(a) of the act. Further, the Court reached its conclusion "despite the absence of specific reference to leasing practices in the act," stating (at pp. 309–310):

> Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience either in fact or in the minds of Congress, does not exist. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219–220; * * *. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created * * *.

See also, *Public Service Comm. of N.Y.* v. *FPC*, 327 F. 2d 893, 896–97 (C.A.D.C.). Of course, the rules must be "reasonably necessary and fairly appropriate" for the protection of the regulatory scheme. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943, 952 (C.A. 10). See also, *American Trucking Assn.* v. *U.S.*, 344 U.S., at 314–315; *National Broadcasting Co.* v. *U.S.*, 319 U.S. at 219 ("Generalities unrelated to the living problems of radio communication cannot justify exercises of power by the Commission").[10] The report and order in dockets Nos. 14895 and 15233 demonstrates the appropriateness and necessity

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signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses."

[9] The *Public Service Commission* case sustained the power of the Federal Power Commission to issue temporary certificates to protect producers, although sec. 7(c) of the Federal Power Act expressly authorized such action only to protect customers, on the basis of the broad provisions of sec. 16 of that act which are virtually the same as sec. 303(r) of the Communications Act. The Court stated (327 F. 2d at 897): "All authority of the Commission need not be found in explicit language. Sec. 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation."

[10] The Commission clearly has no jurisdiction over bowling alleys or theaters, for example, as an administrative agency has no greater power than has been conferred by Congress. *Stark* v. *Wickard*, 321 U.S. 288; *NLRB* v. *Atlantic Metallic Casket Co.*, 205 F. 2d 931 (C.A. 5). Cf. *Peters* v. *Hobby*, 349 U.S. 331. However, unlike bowling alleys and theaters, CATV systems intercept and extend the signals of television stations, and thus have a uniquely close relationship to the regulatory scheme. Moreover, CATV systems are engaged in interstate communication by wire to which the act's provisions are expressly applicable.

of rules requiring all CATVs to carry local stations without duplication for a reasonable period. Moreover, the *Carter Mountain* decision establishes the reasonableness of the requirements. In affirming the Commission, the Court stated that "this does not appear to us an unreasonable condition," but rather "a legitimate measure of protection for the local station and the public interest" (321 F. 2d 359, at 363–364). The notice of inquiry and proposed rulemaking similarly demonstrates the validity of the Commission's concern as to the effect of CATV on independent stations and programing sources, as well as on the development of UHF in the larger markets.

In conclusion, it would appear that under the broad regulatory powers vested in it by the Communications Act, the Commission presently has jurisdiction over all CATV systems, whether microwave is used or not; that there are pertinent provisions of the act applicable to the exercise of authority over such systems (in particular, secs. 1, 4(i), 303(f), 303(h), 303(r), 307(b), and 403); and that the proposed rules and inquiry represent a reasonable exercise of that authority in the circumstances.

APPENDIX D

I. Part 21 is amended as follows:

1. In section 21.710, paragraphs (a) and (b) are amended and a new paragraph (i) is added as follows:

§ 21.710 DEFINITIONS

As used in §§ 21.712 and 21.714:

(a) *Community antenna television systems.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include, (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

* * * * * * * *

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

2. In section 21.712, paragraphs (b), (c), (d)(3), (e), (g), (h), (i), (j) are amended; paragraphs (i)(4) and (k) are added; and note 2 to section 21.712 is deleted:

§ 21.712 AUTHORIZATIONS FOR FIXED STATIONS TO RELAY TELEVISION SIGNALS TO CATV SYSTEMS * * *

* * * * * * * *

(b) *Notification of request for service.* Any such CATV system or other subscriber proposing to utilize such service to relay television signals to any CATV system, either directly or indirectly, shall notify the licensee or permittee of any television broadcast station, within whose predicted grade B contour the CATV system operates or will operate in whole or in part, and the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, of the request for service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an

unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local area, and State educational television agencies, if any. Such notice shall include the fact of the request for service, identification of each CATV system to utilize the service requested (either directly or indirectly), identification of the community served or to be served by each CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

(c) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the station operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher powef.

(d) *Exceptions.* * * *

* * * * * * *

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator.

(e) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

* * * * * * *

(g) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (h) and (i) of this section.

(h) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(i) *Exceptions.* Notwithstanding the requirements of paragraph (h) of this section,

* * * * * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(j) *Disputes between television broadcast or translator stations and CATV systems; requests for waiver of the rules or for different treatment.* In the event that a dispute should arise, at any time, between a television broadcast or translator station and a CATV system served under an authorization subject to this section, on the question of whether the CATV system is complying with the applicable requirements, the matter may be referred to the Commission for a ruling pursuant to the provisions of § 74.1109 of this chapter, either by the licensee carrier, or by the station, or CATV system, with notice to the licensee carrier. Where a dispute has been referred to the Commission for a ruling or where a petition for waiver of the rules or for different requirements has been filed under § 74.1109 of this chapter, with notice to the licensee carrier, microwave service to the relevant subscriber shall not be commenced or terminated until 30 days after the Commission's ruling has been received by the licensee carrier.

(k) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

NOTE 1.—As used in § 21.712(b), the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

II. Part 74 is amended as follows:

1. In section 74.1, paragraph (c) (4) is deleted, and two new paragraphs (d) and (e) are added to read as follows:

§ 74.1 SERVICES COVERED BY THIS PART

* * * * * * *

(d) Community antenna relay stations (subpart J).

(e) Community antenna television systems (subpart K).

2. In section 74.1001(e), subparagraphs (1) and (2) are amended as follows and a new subparagraph (9) is added as follows:

§ 74.1001 DEFINITIONS

* * * * * * *

(e) As used in §§ 74.1031 and 74.1033.

(1) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(2) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour shall be deemed an extension of the originating station.

* * * * * * *

(9) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

3. Section 74.1031(c) is amended to read as follows:

§ 74.1031 ELIGIBILITY AND CONTENTS OF APPLICATION

* * * * * * *

(c) An application for any authorization subject to § 74.1033 shall contain a statement that the applicant(s) have notified the licensee or permittee of any television station within whose predicted grade B contour the CATV system(s) operate or will operate in whole or in part, and the licensee or permittee of any 100 w or higher power translator station operating in the community of each such system, of the filing of the application. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such statement of the applicant shall be supported by copies of the letters of notification directed to such licensees or permittees and educational interests. The notice shall include the fact of filing by the applicant(s), identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television, standard broadcast, and FM station(s) whose programs will be distributed by each such CATV system.

NOTE 1.—As used in § 74.1031(c), the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

4. In section 74.1033, paragraphs (a), (b)(3), (c), (e), and (f) are amended; paragraphs (g)(4) and (h) are added; and the note to section 74.1033 is deleted.

§ 74.1033 LICENSING REQUIREMENTS * * *

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contour the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

(b) *Exceptions.* * * *

* * * * * * * *

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

* * * * * * * *

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of

equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* * * *

* * * * * * * * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

5. A new subpart K is added to read as follows:

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

Contents

SEC. 74.1101 Definitions.
SEC. 74.1103 Requirements relating to distribution of television signals by community antenna television systems.
SEC. 74.1105 Notification prior to the commencement of new service.
SEC. 74.1107 Requirement for showing in evidentiary hearing and Comission approval in top 100 television markets; other procedures.
SEC. 74.1109 Procedures applicable to requests for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

§ 74.1101 DEFINITIONS

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(d) *Grade A and grade B contours.* The terms "grade A contour" and "grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programing.* The term "network programing" means the programing supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programing of one or more stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stations established in § 74.1103(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

§ 74.1103 REQUIREMENT RELATING TO DISTRIBUTION OF TELEVISION SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system with 100 w or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth-priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programing in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

§ 74.1105 Notification prior to the commencement of new service

No CATV system shall commence operations or commence supplying to its subscribers the signal of any television broadcast station carried beyond the grade B contour of that station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted grade B contour the system operates or will operate, and to the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within 60 days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until 30 days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least 30 days prior to commencing service and by systems which propose to extend lines into obviously new geographic areas within 60 days after obtaining a franchise or entering into a lease or

other arrangement to use facilities or, where no new local authorization or contractual arrangement is necessary, at least 30 days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any. The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence. Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within 30 days after notice, new service to subscribers shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided*, however, that service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within 30 days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107. The provisions of this section do not apply to any signals which were being supplied to subscribers of the CATV system on March 17, 1966.

NOTE 1.—As used in § 74.1105, the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

§ 74.1107 REQUIREMENT FOR SHOWING IN EVIDENTIARY HEARING AND COMMISSION APPROVAL IN TOP 100 TELEVISION MARKETS; OTHER PROCEDURES

(a) No CATV system operating within the predicted grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within 30 days after such public notice. A reply to such responses or statement may be filed within a 20-day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system

to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the second report and order in dockets Nos. 14895, 15233, and 15971, FCC 66–220, paragraphs 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. In the event that an evidentiary hearing is held on such a petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

§ 74.1109 PROCEDURES APPLICABLE TO PETITIONS FOR WAIVER OF THE RULES, ADDITIONAL OR DIFFERENT REQUIREMENTS AND RULINGS ON COMPLAINTS OR DISPUTES

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within 30 days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within 20 days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument,

evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within 10 days and reply comments within 7 days thereafter. The Commission will expedite its consideration of the question of temporary relief.

III. Part 91 is amended as follows:

1. In section 91.557, paragraphs (a) and (b) are amended to read as follows, and a new paragraph (i) is added as follows:

§ 91.557 DEFINITIONS

As used in §§ 91.559 and 91.561:

(a) *Community antenna television systems.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than fifty subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" means any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

* * * * * * *

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

2. In section 91.559, paragraphs (a), (b)(3), (c), (e), and (f) are amended; paragraphs (g)(4) and (h) are added; and the note to section 91.559 is deleted:

§ 91.559 AUTHORIZATIONS FOR OPERATIONAL FIXED STATIONS TO RELAY TELEVISION SIGNALS TO CATV SYSTEMS * * *

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contour the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

(b) *Exceptions.* * * *

* * * * * * * *

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the cable whose programing is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

* * * * * * * *

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of any of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* * * *

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(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

3. Section 91.561 is amended to read as follows:

§ 91.561 NOTIFICATION BY APPLICANT

An application for any authorization subject to § 91.559 shall contain a statement that the applicant has notified the licensee or permittee of any television broadcast station, within whose predicted grade B contour the CATV system(s) served or to be served operate or will operate, and the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, of the filing of the application. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such statement of the applicant shall be supported by copies of the letters of notification directed to such licensees or

[NOTE.—Appendix C contains the pertinent rules as subsequently amended by Memorandum Opinion and Order released April 21, 1966 (31 F.R. 6313).]

permittees and educational interests. The notice shall include the fact of intended filing by the applicant, identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

NOTE.—As used in § 91.561, the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent from the action asserting jurisdiction over community antenna systems. In my opinion, the Communications Act does not now confer such jurisdiction and the Commission is without authority to promulgate these rules.

I believe that we should seek legislation to resolve the basic considerations in this matter. Since the real concern surrounding CATV appears to be its possible evolution into pay-TV, I propose an amendment of the Communications Act to preclude community antenna systems from distributing programs other than those received from transmissions of broadcast stations.

I am opposed to the rule's impediments on entry of community antenna systems into the top 100 markets, and specification of the grade B contour, rather than the grade A or lesser contour, as the benchmark for requiring carriage of local TV stations.

STATEMENT OF COMMISSIONER KENNETH A. COX, CONCURRING IN PART, DISSENTING IN PART

I concur in the steps the majority has taken, but must dissent to its failure to take other measures which I believe to be critically important. I think we are, indeed, at a crossroads in the development of our television system—and I gravely fear that the majority has taken a wrong turn.

The Commission has had a sorry record with respect to CATV. In the early 1950's when questions were first raised about CATV, the Commission's staff recommended that the agency assert and exercise jurisdiction over this new phenomenon.[1] However, the Commission of that day, not recognizing the potential impact of widespread CATV development, procrastinated and finally declined to assert general jurisdiction. At first, the consequences of that decision were not readily apparent—and were largely confined to small television markets where CATV, in most cases, performed its true supplemental function. Later the impact of CATV competition assumed more serious proportions, and the Commission began to shake off its lethargy. In the *Carter Mountain* case[2] it denied an application for microwave facilities to serve CATV systems in Wyoming on the ground that the increased competition to a small market television station which would have resulted might have impaired its ability to continue to serve its audience. It indicated that it would grant the applications on conditions designed to protect the station by requiring

[1] See Television Inquiry, hearings before the Committee on Interstate and Foreign Commerce, U.S. Senate, 85th Cong., pt. 6, p. 3490 *et seq.*

[2] *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), *cert. den.* 375 U.S. 951 (1963).

that the CATV systems carry the local station without degradation of its signal and without duplicating its programs.

Then last April, after more than 2 years of consideration of voluminous comments and special studies by the Commission and the broadcast and CATV industries, we adopted minimal rules with respect to microwave-fed CATV systems and proposed to extend them to off-the-air systems as well. It seemed to me—as I'm sure it did to broadcasters who had become increasingly alarmed by the explosive growth of CATV and its extension into larger and well-served markets—that the Commission had finally taken hold of the problem, 14 years late, but in time to prevent serious damage to the fabric of our television service. The Commission was divided four to two, but the majority, after considering and carefully laying out the unfair competitive impact of noncarriage of local stations or duplication of their programs, adopted rules which I think would have gone far toward preserving the system so painfully developed in this country—and promoting its further growth in the UHF. These rules would neither have destroyed existing CATV systems, nor deprived their subscribers of any programs. Similarly, they would not have blocked all future CATV development, but would simply have moved toward insuring that cable systems perform the valuable supplemental service for which they were originally devised. A reading of our first report and order in dockets Nos. 14895 and 15233, 38 F.C.C. 683, with its careful analysis of competition between broadcast stations and CATV systems—with particular emphasis upon the program exclusivity obtained in the market by broadcasters and its importance to their operations—gives one the clear impression that the majority was concerned first and foremost with the preservation and expansion of our over-the-air television system. While it recognized the important service CATV systems can supply to their subscribers, it insisted that CATV was secondary and subordinate in rank, and should therefore be subjected to quite modest restrictions to favor the primary service.

But now, less than a year later, the tone is different. In the report and order now issued—and even more in the deliberations leading up to the decisions reflected there—there has been a shift in emphasis. There is a subtly heightened importance assigned to the diversity of choice which cable systems provide to *some* television homes,[3] with a corresponding depreciation of the local service of area stations. There are expressions of concern that we not block the "new" technology of wired television—though the alternative of wired versus broadcast distribution has long been with us, both in radio and television, and it seems to me that CATV's technology, like its programing, is derivative and much less exciting in its possibilites than the over-the-air mode. And there is a tendency to downgrade program exclusivity—which seemed so important last April—and to forget the unfair competitive impact on broadcast operations of the CATV

[3] As indicated below, I think this is largely due to the vociferous protests, instigated by misleading publicity efforts of certain elements of the CATV industry, of these cable subscribers. While they are a small percentage of the television homes in this country—and usually a minority even in the television markets where they are concentrated—they are still numerous enough to have flooded Congress and the Commission with protests against actions which they were told we were about to take, but which were always exaggerated and sometimes completely false.

practices which we then undertook to regulate. The shift is most obvious in the reduction in the degree of nonduplication protection which is now to be afforded local broadcasters.

Why this change in attitude? I suppose it could be argued that my colleagues who now feel that same-day nonduplication is more in the public interest than the 15 days before and after local broadcast which we specified last April were simply uninformed when they took that action, and therefore made a mistake. They do not advance this explanation, and I am sure it was not true. In fact, they gave much more careful attention to consideration of the details of broadcast and CATV operation last year than they did on this round of discussions.

It would be more normal for such a change in position to be explained in terms of new information which has come to our attention for the first time since our action of last year. This may be the basis for what I regard as drastic impairment of the protection which we then decided should be given to the exclusive program rights a local broadcaster has acquired in the program market—but, if so, it has not been explained to me in these terms. I cannot claim that I have read all the comments in this voluminous proceeding, but in those I was able to examine—drawn from both broadcaster and CATV filings—and in the analysis of all the major comments prepared by our staff, I find no new factual data, and no new arguments, bearing on this issue which satisfactorily explain or justify the abandonment of the 15-day standard previously adopted. And, as suggested above, none of my colleagues have marshaled arguments which they have drawn from the comments to rationalize this new approach. Instead they talk vaguely of balancing interests and minimizing disruption for the subscribers of existing systems not yet subject to the rules, and of the importance of making network programs available to these subscribers on the day they are presented by the networks. If the last of these considerations is so important it seems strange to me that for years we have knowingly permitted television stations to delay network programs for the far more numerous over-the-air audience. Why has no one ever proposed a rule to prohibit this nefarious practice!

The fact is, of course, that except for certain live programs having an element of timeliness—all of which were excluded from the benefits of delayed nonduplication, and are almost never delayed in practice—there is no real urgency about seeing a particular program on a particular day or at a particular time. There may be an element of convenience, but it is one of the disadvantages of the television medium that the viewer must try to adjust his schedule to fit the times someone else—at a network or a local station—has selected for the presentation of his favorite programs, and can change at will. It *is* important that as many network programs as possible be made available in each market. But as I shall point out below, the nonduplication rule now adopted seems to me to be based on the concept that it is better that the cable subscribers, who are a minority, be able to see every network show on its day of origination than that they be furnished every such show, but with some of them delayed for a short period in order to make more of the most popular shows available to *everyone* in the market, nonsubscriber and subscriber alike.

I would like to discuss in detail the discussion, in the first report and order in the microwave dockets, of the period of nonduplication protection to be required, but time does not permit it. Certainly this was one of the longest and most carefully reasoned sections in the document, occupying nine pages in the printed report (see pars. 101 to 127). I find the explanation now offered for abandoning the result there reached so insubstantial as to be shocking. Consider what the majority says in paragraphs 51 to 56. They start by saying that simultaneous nonduplication is clearly called for—which is hardly startling since even NCTA concedes this. It then notes that in the first report we further determined that "some measure of protection beyond simultaneous nonduplication would also serve the public interest on a number of grounds." I think that sets some sort of record for delicate understatement. After carefully considering the data accumulated in over 2 years, we explicitly found that *15-day* nonduplication, before and after local broadcast, was reasonably necessary to achieve fair competition and preserve the local broadcasters' hard-won program exclusivity.

Now the majority say they have reconsidered and made a different balance, "in light of the fact that the rules are now being made applicable to a large number of existing systems and will affect their existing service to the CATV viewing public." Well, that was certainly thoroughly understood in April 1965, when we proposed to extend the microwave rules to the off-the-air systems, and to apply them to microwave service being provided under grants made prior to December 1963. That was the object of the exercise! Why the sudden announcement—as if discovered for the first time—that compliance with the rules "would tend to substantially disrupt the viewing habits of the CATV subscribers." While I don't think the "disruption" is so great as is suggested, and am satisfied that the subscribers would soon become accustomed to the new schedules, certainly we knew a year ago that *some* change would be effected by the rules—otherwise why go to the bother of adopting them. All we have learned since then is that, by the application of some misleading publicity techniques, several hundred thousand subscribers were frightened into sending protests—usually form letters or cards thoughtfully supplied by the CATV operator—to the Commission or the Congress. While I am no more anxious to face the wrath of an aroused public than anyone else, I think some hazard of that kind is involved in making judgments designed to serve the overall public interest but which injure or offend some part of the public. Furthermore, I think it could be demonstrated to the people concerned that their fears were exaggerated—and that in a rather short time they would adjust to the few scheduling changes which would actually be involved.

In other words, I agree that we should avoid *unnecessary* disruption of established viewing habits, but not that we should do so "as much as possible"—which to the majority apparently means that such concern for established, if fleeting, habits of a very small part of the television audience should shape national television policy, not just for them but for all future subscribers of all future systems as well. The majority says it seeks to preserve "the valuable public contribu-

tion of CATV in providing wider access to nationwide programing." I agree that far, but not that there is any necessity for insuring a wider selection of programs on any particular day for a favored few, when I believe it will deprive others of the opportunity, otherwise available, to see certain programs at all. The basic objective of permitting CATV systems to provide greater access to network programs can be fully achieved, as was pointed out in the first report, under 15-day nonduplication.

The majority then blandly announces that "balancing all the pertinent considerations," they think nonduplication should be cut to the same day for existing systems. I don't know what they balanced, since all they have discussed is the danger that some CATV subscribers—certainly not all of them—would have been required to view some network programs—certainly not all of them—at the times they are broadcast by the local station or stations rather than at the time the cable system would otherwise have brought the programs in from distant stations. The only argument then advanced in favor of this result is that it will eliminate the great bulk of delayed nonduplication requests, citing paragraph 125 of the first report. I think this is an argument for the opposite result! Paragraph 125 read as follows:

> 125. There remains the question of the precise extent of the restrictions to be imposed upon nonsimultaneous duplication. After examining this question carefully, we believe that the 15-day before-and-after period proposed in our last notice should be adopted. In dealing with network programs, our sample week study shows that, of all the hours of delayed network broadcasts, 10.2 percent were delayed less than 1 day, 48.9 percent were delayed from 1 to 7 days, 30.2 percent were delayed 8 to 15 days, and 10.7 percent were delayed over 15 days. A more detailed distribution shows that the number of hours of delayed network broadcasts fell off sharply at the end of a 7-day period of delay and once again at the end of a 15-day period.

Thus our study showed that 79.1 percent of delayed network broadcasts were delayed from 1 to 15 days, *and this was used as a principal justification for the 15-day protection adopted.* Now it is argued that reducing the protection to the same day is good because it avoids dealing with the problem the rule was designed to handle in the first place! The majority notes, "as an incidental benefit," that this will also "substantially reduce the areas of possible dispute between broadcasters and CATVs in complying with the rules." Quite so—but this is achieved by cutting the heart out of this part of the rules and reducing the rights of the broadcasters to such a low level that their opportunities for causing "disputes" are very slight. What seems odd to me is that we achieve this happy accommodation by favoring the party to this prospective "dispute" whom the first report found to be engaged in unfair competition in the area of program duplication, to the disadvantage of the party whose program rights the rules were designed to protect.

The majority then concedes that its concern about disruption as a result of 15-day nonduplication would not apply to new systems going into service hereafter. Thus even if we must defer to the private interests of a relatively few people in not having their viewing habits modified in the slightest, it is clear that the more effective protection of the

policy adopted in the first report could be applied to new systems since their subscribers would have no established viewing patterns. But the majority does not even adhere to policy in this partial fashion. They say that even here there would be disruption because the subscriber may not be able to view programs from distant stations at the times specified in his TV guide. They are so solicitous of the future subscriber that, again, they completely overlook the interests of the nonsubscriber. What about the "disruption" suffered by the resident of a sparsely settled area who has no cable service, or the urban viewer who can't afford such service, and who read in this same unspecified TV guide[4] of programs carried on distant stations on the cable but which are not available to them on the local station(s), though they would have been if the local broadcaster's first-run rights had been adequately protected? There has been a lot of talk that the Commission's regulation of CATV operations would make second class citizens of cable viewers. It seems to me that the majority has gone overboard in the other direction by shaping policy to accord a ridiculous degree of importance to these people's assumed interests. It's hard for me to weep for the cable subscriber who is going to receive more stations—though probably no more real services—than the people of New York City but who, we are now told, must not only have this wealth of program choice but must also have every program available to him the same day it is made available to viewers in New York.

I would like to expand upon the impact I think this curtailed protection will have on the nonsubscriber. In one- and two-station markets the local broadcaster tries to put together the best possible schedule for his viewers, drawing on more than one network. Since conflicts are almost inevitable between the more popular programs of the competing networks, this has customarily meant that most of the programs are presented at the time of network feed, if the station is interconnected, but some are broadcast on a delayed basis. While some CATV interests have sought to denigrate this practice by calling it "cherry picking," it seems clear to me that it has served—and would continue to serve—the public interest by making available in markets with less than three stations the best of the offerings of all three networks. And delayed broadcasting serves the public even in a three-station market, by permitting the local affiliate to rearrange the network schedule, to the limited degree his network and its advertisers will permit, in order to present a service which he thinks is more in the interest of his local audience. I think such local flexibility is in the public interest and should be preserved. A couple of years ago the Commission abolished option time and struck down CBS's incentive compensation plan because, in part, they impaired the local station's independence in reaching decisions as to clearance for programs offered it by its network. I think the clear result of the restricted nonduplication protection now being afforded will be to impel every station located in a three-station market and carried on CATV systems serving a substantial percentage of its audience to clear live for all the network shows it plans to pre-

[4] Certainly if 15-day protection were afforded the CATV operator would not publicize locally any programs he could be required to delete, but would tell his subscribers when they could watch the programs on the cable on the *local* station.

sent. I do not think this straightjacketing of the local broadcaster is desirable.

I think the impact will be even greater in markets with one or two stations. To the extent they now delay network programs—which 15-day nonduplication was specifically designed to protect—I think such stations have been providing a service to their audiences. I think they will now be sharply restricted in their ability to continue this service—if not totally precluded from doing so. As long as only a small part of their audience is served by cable systems, they can probably continue to present programs on a delayed basis even though some of their potential viewers will have seen the program a short time earlier. But if and when cable subscribers become a really significant factor in the market—and such operations are expanding at a rapid pace—then the broadcaster will not, I think, be able to continue to present programs selected from more than one network. It will be difficult enough to compete with the current offerings of a substantial number of distant stations—probably located in a larger market—without trying to do so with a program which a third, a half, or more of the local station's audience have already had an opportunity to watch. The majority, in paragraph 51, tries to shore up its argument about "disruption" as to new systems by saying that it is because of such concerns that some broadcasters, although entitled to 15-day protection, have requested only simultaneous nonduplication. In paragraph 116 of the first report we stated that NCTA had shown "a few instances" of such concessions by broadcasters, but did not regard this as of decisional importance. In the cases I know of where broadcasters who were entitled to *no* protection under the rules were able to bargain for simultaneous nonduplication, the result has been that they present no delayed programs, or at most one or two.

The majority seeks to support its refusal to give greater nonduplication protection as to new CATV systems by arguing that it is obviously preferable to have one set of rules for all systems. Of course I would prefer that, too, though I think the single rule should provide for 15-day protection. But we quite often adopt tightened rules which would bear harshly on existing operations, and in most cases we handle the problem by grandfathering the situations which have already developed and applying the new rule prospectively. That is exactly what we could do here—and should do since my colleagues are unwilling to inconvenience the subscribers of existing cable systems. This is common governmental practice, and often involves much more substantial discriminations than would be the case here.

The majority then turns to the question whether it should retain 15-day nonduplication protection for nonnetwork programing. It decides not to do so for the surprising reason that it afforded minimal protection at best. In other words, having given very restricted nonduplication protection to nonnetwork programs out of concern for CATV systems (see par. 123, first report), the Commission now withdraws even that effort to insure the local station of a small fraction of the program exclusivity for which it has bargained. Why, then, did we make this provision last April, when we knew as much about this aspect of the matter as we do now? I agree that 15 days is no enough,

and am satisfied that we will do serious damage to the present method of program distribution unless we give the broadcaster at least protection of his right to be the first to present each program he purchases for his market. The majority says it has determined that we must look elsewhere if we are to achieve effective relief in this respect. This refers to some extension of the concept of permission to rebroadcast to cable operations. I think that this requires legislation, which may take a long time—and in any event I do not think it will necessarily provide the protection the majority seems to be seeking—though not very aggressively. The legislative proposal we have submitted to Congress calls attention to the problem but makes no specific recommendation. In paragraph 152(iii) the majority concedes that they are not in a position to state whether a section 325(a) approach would be effective and fully consistent with the public interest. That being the case, I do not think they are in a position to abandon the only protection now given the broadcaster—minimal though it is.

The majority drops an interesting footnote to paragraph 55, in which it says that same-day nonduplication affords "substantial" protection to the most popular network programing so that "*most* network affiliated stations should be viable." [Emphasis supplied.] It must be encouraging to broadcasters faced with serious and growing CATV competition to know that the majority thinks that not too many of them will go under—with loss not only to the businessmen concerned, but also to the local audiences they serve.

In paragraph 56 the majority concedes that conflicting public considerations are presented—though they have carefully avoided mentioning a single factor favoring retention of 15-day protection—and conclude that their resolution constitutes a fair compromise. I fail to see much evidence of this alleged balancing of competing interests. It seems to me that zeal to avoid at all costs any disruption to existing cable subscribers has carried the day. I don't think this matter was really in issue at this stage of the proceeding. We did indicate that we wanted comments as to policy with respect to duplication of programs broadcast by the local station in black and white but available in color on a distant station on the cable. The parties duly addressed themselves to this question. But as to the extent of nonduplication protection, I think the general understanding was that we had reached a careful decision of this issue last April in adopting the microwave rules, and that if we adhered to our tentative conclusion as to jurisdiction over all CATV, there would be no change in this provision of the rules unless (1) experience with the microwave rules uncovered flaws, or (2) someone demonstrated that off-the-air systems are so different that these rules could not appropriately be carried over to them. I know of no evidence of the former, and no one seriously tried to establish the latter—not even the NCTA, which simply incorporated the arguments it made to Congress last May in an effort to show that certain stations had prospered without delayed nonduplication.

But without any such showing of a need for change in the comments filed in the proceeding, the majority has abandoned the position it developed so carefully last year. I suppose this simply proves the power of the pen when wielded by thousands of indignant members

of the public—even when they have been intentionally misled into writing in the first place. I think this provides an interesting—though rather depressing—chapter for students of the administrative process.

I agree that same-day nonduplication takes care of the time zone differential problem, but that's about all that it does over and above simultaneous nonduplication which NCTA was willing to concede months ago. The majority says it will afford the station affiliated with more than one network "some leeway" in presenting the most attractive programs of each, but then indicates just how much leeway the broadcaster has by reminding him that he must present it the same day the network did and that prime-time programs must be broadcast entirely within prime time. It may be that he can shoehorn in a few programs on this basis, though I believe it will require some changes in policy by some of the networks—and will certainly involve added expense for the station. Thus if it has been delaying network programs through the use of film, it would have to buy a videotape machine—and that's no small expense item, especially if he has to be able to handle color in order to be entitled to protection. Further, unless the network in question provides him an advance feed, he will have to have two loops into his studio, one for the live broadcast going out over the air and the other to feed the tape machine with a program coming in at the same time from another network. Since one- and two-station markets are usually small, this may pose serious problems for the broadcaster, and he may simply throw up his hands and carry the full schedule of a single network to avoid trouble and expense. If he does, the public will lose by it—and so will he, in terms of lowered average audience. I much prefer the greater flexibility permitted by the 15-day rule, and do not think the majority has even addressed themselves to this problem—much less assured themselves that what they speak of is feasible.

The majority inserts another footnote at this point, noting that the amount of delayed network broadcasting in the median one- or two-station markets is about 5½ hours and 11 hours per week, respectively. They cite paragraph 108 of the first report, which also shows that in one-station markets the range was from ½ to 23½ hours, and in two-station markets, from 1 to 42½ hours. So when they concede that the median is not insignificant and that there will be some detriment to the public if the local station curtails delayed broadcasts, they must also recognize that for half the markets involved (84 one-station and 57 two-station) the impact will be more severe. Nonetheless, they console themselves with the thought that the amount of delayed broadcasts is not too large in the median market. But what puzzles me is that it was unwillingness to "disrupt" established viewing patterns as to these very same programs which led them to cut back on nonduplication protection. If they worry about showing these 5½ or 11 hours of programing at later times to CATV subscribers, why are they so nonchalant about the risk that the equal, or greater, number of nonsubscribers may lose all, or a substantial part, of that programing? I would think that any sensible balancing of equities here would favor the nonsubscribers.

The other area of my disagreement with the majority concerns their treatment of the major market, distant stations issue. Since they will do no more, I support what they have done. However, I would have favored a broader rule—which I am sure that would be easier to administer than the policy of multiple petitions, waiver requests, and hearings to which we are now committed.

Certain of the broadcast entities filing comments in this proceeding urged us to exercise our authority under section 303(h) of the act "to establish areas or zones to be served by any stations." It was variously suggested that this be done by limiting CATV systems to carriage of stations providing a specified signal over the communities in which they are located, or by specifying a maximum mileage beyond which no station's signal should be extended. This is clearly an aspect of our responsibility for allocations—an area in which even critics of the Commission concede our authority, and in fact recognize that the agency was created primarily and specifically for this purpose. We have thus far exercised this authority in television by establishing a carefully designed table of channel allocations and by fixing maximum limits on heights and powers. While there are many situations in which deficiencies in service can and should be corrected by supplemental means such as CATV, satellites, and translators, I do not believe that any of these auxiliary services should be permitted to disrupt the basic television system that Congress, the Commission, and the broadcasters have worked so hard to establish.

It is precisely because one of these supplemental services, CATV, has taken a new and unexpected course that we are involved in this proceeding. I think its explosive development poses a threat of disruption to our television broadcast system, and that this is therefore the time to take hold of the problems presented and to fit cable operations into an appropriate place in the overall television structure. While the majority has undertaken to deal with part of these problems, I think it is not doing so in allocations terms and will, as a result, be unable to deal with the situation soundly, consistently, and expeditiously.

The majority contents itself with saying that CATV entrepreneurs seeking to bring distant signals—that is, signals carried beyond the originating stations' grade B contours—into the top 100 television markets will be required to demonstrate, in an evidentiary hearing, that they will not impair UHF development there or serve as a springboard to pay-TV. I would greatly prefer an approach which would bar new systems—for a 5-year period which would allow time for UHF growth and, perhaps, resolution of the copyright question—from extending any station's signal beyond its grade B contour, except upon authorization by the Commission in certain carefully defined situations. For example, I think we should permit greater extension of service by CATV systems where they carry signals into communities not receiving three network service over the air. But without some such limitation which would stem the proliferation of cable systems in areas already receiving substantial television service, I am afraid that CATV will stunt future growth of our free television system, and perhaps even impair the viability of some of the stations now serving the public.

Even assuming that we should employ the majority's hearing procedure, instead of a rule which I think might be sounder legally and certainly simpler to manage, I would not cut it off at the top 100 markets. While it is true that much current UHF activity is centered in these major markets, and that the risk of CATV becoming pay-TV on the basis of signals appropriated from the broadcasters is greatest there, I think there are compelling reasons for treating the smaller markets in the same way.

It seems to me that the majority's concerns about economic impact and fair competition apply with even greater force in these smaller markets. Certainly many of the more than 130 stations in these markets are marginal operations, and therefore much less able to withstand duplication of their programs and fragmentation of their audiences than the more profitable stations in larger cities. I therefore do not think it is logical to subject them to greater exposure to CATV competition than the stations in major markets, which may well be the effect of the majority's different treatment of the smaller markets.

One ground for this cutoff at the 100th market given by the majority is the fact that any delay incidental to the hearing procedures required is mitigated by the fact that the major markets generally have a considerable amount of service now, plus the prospects of new service. However, most of the markets from 75 to 100 have not more than 3 existing stations, while 20 markets below 100 also have 3 or 4 stations. It is true that the larger the market, the greater the likelihood that someone will be interested in building a fourth station. However, there has been interest in UHF stations to provide a fourth service in markets as far down as the 93d, and it seems likely that if favorable conditions can be maintained, in due course such developments can be expected in still smaller markets. Similarly, there should eventually be interest in putting third stations on the air in the 34 small 2-station markets. Beyond that, the Commission has made many allocations of single UHF channels to medium sized communities, and is presently proposing a class of low-power community stations to serve many more even smaller communities. Unless all these plans are to fail, the purposes of Congress in enacting the all-channel legislation to be frustrated, and this country to be left with a stunted television system, our regulation of CATV operations must channel their growth in ways which will not add to the problems facing upcoming UHF stations.

While the majority's proposal does not exclude the smaller markets from all relief, it at the very least raises procedural difficulties which I think impose unreasonable burdens on the very stations least able to bear them. In the first place, they must initiate the proceeding to consider the role of CATV in their market, while in the top 100 markets this burden is upon the CATV applicants. Then it seems to be suggested that different presumptions apply here, or that the burden of proof is shifted to the broadcaster, whereas in the larger markets it is on the CATV operator. It seems to me that in *all* markets the burden should be upon the CATV interests to demonstrate that their projected operations will not damage or destroy local broadcast service.

Of critical importance, of course, is what happens while the Commission is pondering these cases. In the major markets, presumably CATV activity must halt until we approve their entry. In the smaller markets, however, they can go ahead unless and until we act favorably on a request for stay.

Furthermore, the majority makes clear that in the top 100 markets private agreements between broadcasters and cable operators, though to be given weight, will not be controlling. However, this proviso apparently does not apply below the 100th market, and I'm afraid some broadcasters or prospective broadcasters in the smaller markets, faced with the added burdens outlined above, may try to work out arrangements whereby they will acquire partial interests in the CATV systems proposed for their areas in return, in part at least, for not instituting procedures to protest the CATV developments. While this may, to some degree at least, solve their personal financial problems, I am not sure it will adequately protect the public's interest in its available and potential free broadcast service. I certainly hope the small broadcasters will not take this course, but under the majority's procedures CATV can spread unchecked in these small markets unless someone—a broadcaster or a prospective applicant—goes to the trouble and expense of filing a protest.

One final thing concerns me about this different treatment of the smaller markets—I am afraid it will undercut our policy in the top 100 markets. If we permit the signals of the New York City independents to be put on CATV systems in smaller markets scattered around the country in areas falling between major markets, it seems to me this will create pressures to relax our policies so that the same service can be offered there. In paragraph 54 the majority justifies its failure to continue 15-day nonduplication as to new CATV systems by saying it would be anomalous to have different rules applicable to propose here. If they think that cable subscribers would object to mere delay in presenting programs that people in neighboring towns can see on the day of network release, what do they expect to happen when people in the top 100 markets find that they cannot get a service available to residents in smaller towns all around them?

The only way to deal realistically with this problem is to impose limits on the distance to which signals can be carried. I would treat all communities receiving usable services of the three networks alike, and require a showing in every case before permitting institution or extension of CATV operations employing distant signals.

Separate Statement of Commissioner Lee Loevinger re Second Report and Order in CATV Proceedings

I concur in the substantive provisions of the order but I cannot join in the opinion or agree that the Commission has the jurisdiction which it now asserts.

The opinion (here called "second report") which purports to support the present order seems to me to illustrate many of the worst aspects of the institutional decision. The opinion does not really rationalize or justify the result reached, but rather accepts it some-

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what grudgingly. This is a product of the fact that the opinion was originally drafted by the staff to support an entirely different result. Despite the efforts and instructions of the Commission, and a series of revised drafts, the instant opinion is substantially similar to the document which was written to support a different result. The opinion refers to little evidence and much of that is inconsistent, assumptions and speculation substitute for facts, the reasoning is circuitous and illogical, and the statement is so turgid and prolix that it does more to obscure than illuminate the subject. I can concur fully only in paragraphs 97, 98, 150, and 156 to the extent of my concurrence in the order.

What the Commission is doing in the instant order is to exercise its quasi-legislative powers. Consequently the decision to issue or join in the instant order is a legislative judgment. I concur in the substantive provisions of the order not because I think it is wholly logical or the best method of dealing with the subject, but because it seems to me to be the best and most reasonable proposal that has any practical chance of securing approval by a majority of the Commission. This is, in my opinion, a legitimate basis for making a legislative judgment.

On the other hand, the assertion of jurisdiction is a legal matter that requires a legal judgment. Nothing has appeared or occurred since the previous Commission statement on this subject that furnishes any basis for reaching a different conclusion as to jurisdiction than the one set forth in my prior opinion. (38 FCC 683, 746 (1965).) Accordingly I adhere to that opinion and to the conclusions stated there.

The Commission rule requiring a hearing before CATV is permitted to commence operation in any of the 100 largest markets is particularly questionable. The ostensible justification is that CATV might become pay-TV. This reason is flimsy, since that danger—if it is a danger—could be met much more easily by less burdensome requirements.

Nevertheless the substantive position now adopted by a majority of the Commission seems to me to be the most moderate and reasonable compromise of sharply conflicting views and positions that has any practical chance of approval. It is of the greatest importance that the Commission now recognizes the necessity of requesting Congress to legislate on jurisdiction and other important aspects of this matter, and has done so. In these circumstances, I think the most constructive and useful course is to support affirmative action by the Commission, leaving the jurisdictional issue to decision by Congress and the courts, and looking to Congress for further guidance as to regulatory matters. Accordingly I concur in the substantive provisions of the legislative rules now promulgated by the Commission.

[This document is not part of the certified record in this case but all parties agree that it should be included in this Appendix for the Court's convenience.]

FCC 66-456

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF SUBPART L, PART 91, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE BUSINESS RADIO SERVICE FOR MICROWAVE STATIONS TO RELAY TELEVISION SIGNALS TO COMMUNITY ANTENNA SYSTEMS	Docket No. 14895
AMENDMENT OF SUBPART I, PART 21, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE FOR MICROWAVE STATIONS USED TO RELAY TELEVISION BROADCAST SIGNALS TO COMMUNITY ANTENNA TELEVISION SYSTEMS	Docket No. 15233
AMENDMENT OF PARTS 21, 74, AND 91 TO ADOPT RULES AND REGULATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS	Docket No. 15971 (RM Nos. 636, 672, 742, 755, and 766)

MEMORANDUM OPINION AND ORDER

(Adopted May 25, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER ABSENT.

1. The Commission has before it for consideration seven petitions for stay of the effective dates of the second report and order in dockets Nos. 14895, 15233, and 15971, 31 F.R. 4540, 2 FCC 2d 725, filed by: (1) Cox Broadcasting Corp. and Cox Cablevision Corp.; (2) Cosmos Broadcasting Corp. and Cosmos Cablevision Corp.; (3) Television Communications Corp.; (4) Columbus Broadcasting Co., Inc., and Chattahooche Valley CATV, Inc.; (5) Buckeye Cablevision, Inc.; (6) Newhouse Broadcasting Corp., New-Channels Corp., Delhi Video, Inc., Cabletron, Inc., and Cablevision Co. of Anniston; and (7) the Jerrold Corp., Jerrold Electronics Corp., Ottawa TV Cable Co., Inc., Streator TV Cable Co., Inc., Logansport TV Cable Co., Inc., Pontiac TV Cable Co., Inc., Greater Lafayette TV Cable Co., Inc., Florida TV Cable Inc., Amsterdam TV Cable Co., Gloversville TV Cable Co., Inc., Johnstown TV Cable Co., Inc., Mohican TV Cable Corp., Alpine Cable Television, Inc., Alice Cable Television Corp., McAllen Cable Television Corp., and Perfect TV, Inc. Petitioners request the Commission to stay enforcement of the rules promulgated in the second report until resolu-

tion of their concurrently filed petitions for reconsideration and until final adjudication of appeals from the second report or action by Congress, whichever should occur first.[1]

2. In support of their requests for stay, petitioners assert generally, without specific factual detail, that their interests and those of their subscribers will be immediately and irreparably adversely affected unless a stay is granted because petitioners may be forced to delete certain signals from their existing CATV systems, be denied the right to carry certain signals on proposed CATV systems, and may lose considerable funds expended in connection with present and proposed CATV investments, all of which will injure the public's reception of multiple television signals. It is further alleged that substantial legal questions are raised by petitioners' petitions for reconsideration with respect to the Commission's assertion of jurisdiction and the manner in which the rules were implemented. In view of the highly contested nature of the Commission's jurisdictional and other actions, the pending court appeals from the second report and the likelihood of further appeals, petitioners assert that the Commission should stay the effectiveness of the rules pending a decision on the several petitions for reconsideration and/or on the several appeals already filed and to be subsequently filed, or until final determination by the Congress of legislative proposals in this field.

A. THE CARRIAGE AND NONDUPLICATION RULES

3. Although petitioners seek a stay of the effectiveness of all the rules promulgated in the second report and order, their petitions for reconsideration do not challenge the substantive provisions of the carriage and nonduplication rules. Apart from asserting generally that jurisdiction is lacking and that evidentiary hearing or oral testimony was required, petitioners direct their contentions primarily toward section 74.1107 of the rules governing distant signals in major markets.

4. A preliminary examination of the petitions for reconsideration does not disclose any substantial likelihood that petitioners will prevail on merits of their jurisdictional argument. The petitions merely reiterate contentions which we have already considered and rejected in the second report (2 FCC 2d at 728–734, 793–797). Nothing new has been presented to alter our conviction that "the case for present jurisdiction is a strong one" (2 FCC 2d at 733).

5. Nor are petitioners likely to prevail on the merits of their argument that promulgation of the rules on the basis of the rulemaking proceeding, without conducting a full evidentiary hearing or hearing oral argument, was violative of due process. As petitioners concede, the Administrative Procedure Act does not require oral testimony or oral argument in rulemaking proceedings. The due process requirement of the fifth amendment "is not technical"; "argument may be oral

[1] Except for Buckeye Cablevision, Inc., petitioners make identical points in their petitions for stay and reconsideration and request the same relief. Buckeye seeks a stay of enforcement of the rules and the cease and desist proceedings in docket No. 16551, as to Buckeye, pending final orders determining the validity of such rules, the related enforcement proceedings against it, and its petition for waiver. (file No. CATV 100–5).

or written," so long as there is a "hearing in a substantial sense." *Morgan* v. *United States*, 298 U.S. 468, 481; *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710; *F.C.C.* v. *WJR*, 337 U.S. 265. Petitioners do not point to any evidence or argument which they have been precluded from adducing. All interested persons were accorded a full opportunity to present factual material and policy arguments in written form and to reply to the comments of others before the rules were promulgated.

6. We concluded in part I of the second report that a general evidentiary hearing on the carriage and nonduplication rules would serve no useful purpose (2 FCC 2d at 744). Moreover, the top 100 markets procedure adopted in section 74.1107 does accord the persons affected a full evidentiary hearing "in the context of the particular request and the particular situation," a procedure which we considered better suited to promote the public interest than a hearing of an overall nature (2 FCC 2d at 782). And provision has been made in section 74.1109 for evidentiary hearing, where appropriate, in individual situations involving the applicability of the carriage and nonduplication rules and in other appropriate situations not coming under the mandatory hearing requirement in section 74.1107(a).[2]

7. Petitioners have also failed to show that a stay of the effectiveness of the carriage and nonduplication rules is necessary to preserve them or the public from irreparable injury. We concluded in the first and second reports that these provisions generally are necessary to protect the public interest and "need impose no substantial burden on the ordinary CATV operator or his subscribers." First report and order in dockets Nos. 14895 and 15233, 38 FCC 683, 713–715; second report, 2 FCC 2d at 735–737, 747–749. The ad hoc procedures in section 74.1109 afford an adequate avenue for obtaining appropriate relief in individual situations. Indeed, the rules were not made effective as to existing off-the-air systems for an additional 60-day period to facilitate requests for waiver, our aim being to "allow an orderly transition period for the relatively small number of systems with limited channel capacity whose viability might be jeopardized by immediate application of the rules, or where existing service to CATV subscribers would be unduly disrupted" (second report, 2 FCC 2d at 768, 789). See also, memorandum opinion and order in docket No. 15971, issued on April 21, 1966, FCC 66–354.[3] We emphasized that "we intend to make every effort, consistent with the public interest, to avoid disrupting existing service to the public in applying the car-

[2] While the notice of inquiry and notice of proposed rulemaking (1 FCC 2d 453, 477) indicated that the Commission may specify oral argument or oral testimony after study of the comments, it also provided a shorter time for comments on pt. I and par. 50 of the rulemaking and stated that "the Commission may well spin-off portions of the rulemaking for early decision, since other portions may require lengthy consideration." We specifically stated that we would "reach an early determination" on par. 50 (1 FCC 2d at 472). In light of the comments on pt. I and par. 50, the urgent need for prompt action in the public interest, and our disposition of these aspects, we decided against oral procedures on the spun-off portions. However, further oral or written procedures may be specified on those portions of docket No. 15971 which were not resolved in the second report (see pars. 51–64 of the notice).

[3] Where a petition for waiver of the carriage provisions is filed on or before June 17, 1966, or within 15 days after any subsequent request for carriage, the system need not carry the station pending the Commission's ruling on the petition. See sec. 74.1109(h) of the rules.

riage provisions of the rules to systems now in operation" (second report, 2 FCC 2d at 753–754).

8. In light of the foregoing, we conclude that the public interest would be served by denial of the request for stay insofar as the general effectiveness of the carriage and nonduplication rules are concerned. Petitioners have given no indication of their individual circumstances in their petitions for stay nor have they petitioned for waiver.[4] However, if hardship circumstances exist, petitioners' proper course is to pursue their available administrative remedy.

B. SECTION 74.1107

9. The petitions for reconsideration are principally directed toward section 74.1107 of the rules. This section prohibits any CATV system operating within the predicted grade A contour of a television broadcast station in the 100 largest television markets (as ranked by American Research Bureau on the basis of net weekly circulation for the most recent year) from extending the signal of a television broadcast station beyond the grade B contour of that station except upon a showing, made in evidentiary hearing and approved by the Commission, that such extension would be consistent with the public interest and specifically the establishment and healthy maintenance of television broadcast service in the area. The mandatory hearing requirement does not apply to service being supplied by a CATV system to its subscribers on February 15, 1966, the date on which the Commission issued a public notice announcing that such a rule was being adopted (FCC public notice 79927). Section 74.1107 was made effective upon publication in the Federal Register on March 17, 1966, pursuant to the Commission's finding that good cause existed for immediate effectiveness (second report, par. 147; sec. 4(c) of the Administrative Procedure Act).

10. Petitioners claim that good cause has not been shown for making the rule effective on publication in the Federal Register. They further assert that the rule by its terms is retroactive, arbitrary, and unlawful in its application because the February 15, 1966, grandfathering date is geared to our public notice of February 15, 1966, which was not published in the Federal Register. In addition, petitioners urge that the notice of inquiry and notice of proposed rulemaking in docket No. 15971 (30 F.R. 6078) did not afford specific notice of the grandfather date or of the substantive provisions of section 74.1107.

11. We believe it important to point up the issues presented. The first issue is whether there should be grandfathering and if so, the nature of such grandfathering. A second, and related, issue is whether good cause existed for making the rule effective upon publication in the Federal Register. We shall discuss these issues in turn and then treat the question of appropriate notice under the Administrative Procedure Act.

12. *The grandfather issue.*—In the second report we found that serious questions are presented as to "whether CATV operations in

[4] Petitioners Buckeye and Gramos Cablevision Corp. have filed petitions for waiver of sec. 74.1107, but not of sec. 74.1103.

major [television] markets may be of such a nature or significance as to have an adverse economic impact on the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature" and as to "the relationship, if any, of proposed CATV operations on large markets and the development of pay-TV in those markets" (second report, 2 FCC 2d at 781, 770–781).[5] We concluded that it is essential to examine such CATV operations before they become established or well entrenched (2 FCC at 782). We pointed out that such a procedure accords with the basic policy of the Communications Act to resolve important public interest questions before consequences possibly adverse to the public interest develop (ibid.). The crucial consideration was that unless the statutory policy is followed in this instance, any adverse consequences to the public would be irreparable. For, as we stated (2 FCC 2d at 782): "Once entrenched, it is difficult, if not wholly impracticable in light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest."

13. We found, therefore, that there are important public interest questions to be resolved in these major market situations. Since that is so, we could have simply made our rule applicable upon its effective date to all CATV systems, without any grandfathering; or, as urged by some of the commenting parties, we might have grandfathered only those systems which commenced operation to their subscribers before April 23, 1965 (the date of issuance of our notice of proposed rulemaking in docket No. 15971). The difficulty with such approaches, in our judgment, was the very substantial disruption to the CATV viewing public which could result from requiring a cessation of distant signal service in major markets significantly after CATV service had been initiated. Some appropriate form of grandfathering was therefore in order. Here again we might have chosen a date such as January 1, 1966, on the ground that there might not be too much disruption since systems which commenced operation after that date would not ordinarily have a great number of subscribers. Instead, we determined to take an approach even more liberal to the CATV industry, and adopted the February 15 grandfather date—the date on which the Commission reached informal agreement on its general policy in this area. There was widespread interest in our discussion, both in Congress and in the industries involved, and we therefore publicly announced the overall course we had determined upon.

14. There is thus no question of retroactivity, as urged by petitioners. The rules were made effective on March 17, and affected the operation of systems as of that date—not before. The real issue put forth by petitioners in this respect is not retroactivity but that the Commission should have grandfathered all systems as they were operating on March 17—the effective date of the rules (and the date of publication

[5] We need not repeat here the detailed discussion in the first and second reports as to the injury to the public if UHF should fail a second time or as to the inability of CATV adequately to replace the lost service. See second report, 2 FCC 2d at 735–736, 774–775; notice of inquiry and notice of proposed rulemaking in docket No. 15971, 1 FCC 2d 453, 468–471; first report, 38 FCC 683, 699–701; *Carroll Broadcasting Co.* v. *F.C.C.*, 228 F. 2d 440 (C.A.D.C.).

in the Federal Register). But, in our judgment, there are sound reasons militating against such a course.

15. Because of the rapid pace of CATV growth, even a postponement of several weeks might have irrevocably changed the existing situation to a substantial degree. As set forth in the second report (2 FCC 2d at 771):

> * * * CATV growth has been explosive and gives every indication of continuing its phenomenal spurt. In 1959, there were about 550 CATV systems, in 1965 at the time of the first report, there were about 1,300 CATV systems, and today—less than a year later—it is estimated that there are 1,565 (Television Digest, Dec. 27, 1965, at p. 3). Further, there are 1,026 CATV franchises which have been recently granted but are not yet operating (ibid.). The number of applications for franchises is even larger—an estimated 1,958.

It is now estimated that in the first 3 months of 1966, the period of issuance of the February 15 notice and the second report, the number of operating systems increased to 1,629 and the number of franchises not yet operating to 1,207 (Television Digest, Apr. 4, 1966, CATV addenda, p. 1). We have also been advised by American Telephone & Telegraph Co. that Bell System associated companies have effective tariffs in 37 States to furnish facilities to CATV systems which may or may not require local franchise authorization. Bell has 26 systems under construction, 50 firm orders, and over 300 letters of intent.

16. It is highly likely that a great number of the proposed systems not yet in operation are located within the grade A service contours of stations in the top 100 markets and would bring in distant signals. For, whereas existing CATV service has been largely confined to smaller markets lacking three full network services, the CATV industry has shifted its attention to the larger communities and these are the "centers of the most intense CATV development now" (second report, 2 FCC 2d at 772, 740–742). Since February 15, new operations have commenced or expanded into apparently new geographic areas in the vicinity of, or within, the cities of Toledo, San Diego, Cleveland, and Buffalo.[6]

17. Of particular concern in our decision to adopt the February 15 grandfathering date is the tendency of some business entrepreneurs to make extraordinary efforts to commence operations before an announced deferred deadline which will confer grandfather rights. If the effective date of section 74.1107 had been postponed until 30 days after publication and the grandfathering line had been drawn either at that point or at the publication date, it is likely that many of the 1,207 franchised systems not yet in operation would have made extraordinary efforts to commence service to a token number of subscribers before the deadline, in order to be in a possible position to expand throughout the entire community without undergoing the hearing which we have found required by the public interest. It is reported, for example, in the April 4, 1966, edition of Cable Television Review (p. 3) that in Toledo, petitioner Buckeye, who is challenging the validity of the February 15 grandfathering date, "raced the clock prior to the March 16 FCC report and order deadline, and was deliver-

[6] These operations are presently the subject of Commission inquiry pursuant to sec. 74.1107 or sec. 74.1109 of the rules, or sec. 312(b) of the Communications Act.

ing signals to 52 homes 8 hours before the 17th" (opposition of Storer Broadcasting Co. to petition for stay, p. 3).

18. Thus, the effect of grandfathering on the basis of the publication date or 30 days thereafter would have undoubtedly been an all-out effort to beat the deadline, and therefore a significant additional number of systems in operation in the top 100 markets. We have set out in the second report (par. 149) the difficult practical questions that may be raised in attempting to draw a line in the community to halt the expansion of a new system. See section 74.1107(d). It would clearly not serve the public interest to foster the development of a situation where the system just commences operation and we then attempt to act as quickly as possible to halt growth. We would be promoting disruption to the public and a chaotic situation, rather than orderly consideration of the important public interest questions raised prior to the commencement of service—the thrust of our major market, distant signals policy. In short, we simply do not believe that in a situation of rapid change we are precluded from taking immediate action to stay, pending hearing, the commencement of new operations which could be seriously detrimental to the public interest and which by the act of coming into being might preclude effective remedial action by the Commission—at least without substantial disruption to the public. Sound public interest considerations therefore existed for drawing the grandfathering line at February 15. We stress again that selection of this date was less stringent action than an earlier cutoff, and was designed to minimize any disruption in existing service to the CATV segment of the viewing public, while at the same time affording necessary protection against possible irreparable injury to the public interest from a pell-mell scramble for commencement of new operations in major markets during a hiatus:

19. Complaint concerning the lack of publication in the Federal Register of the public notice of February 15, 1966, misses the point. That notice did not constitute Commission action and did not require any action or course of conduct by CATV systems. It simply announced, inter alia, the grandfathering date that had been decided upon in the Commission deliberations and which was to be incorporated in the regulations which were still to be issued. A party who commenced new distant signal operations in major markets during the period between February 15 and March 17, 1966, when section 74.1107 became effective upon publication in the Federal Register, was not in violation of the rule during that period or subject to any sanction. All that the rule requires is that distant signal operations commenced after February 15 be suspended on and after March 17, 1966, pending the requisite hearing on the merits. In short, whatever the grandfathering date selected—April 23, 1965, as urged by some, January 1, 1966, or February 15—there was no legal requirement for immediate announcement of the date and immediate publication in the Federal Register. What was legally required was publication of the rule, with its grandfathering date, in the Federal Register, and this of course was done.

20. As a practical matter, we point out that we did announce in the public notice of February 15, 1966, the consensus which had developed in our meetings, both as to carriage and nonduplication requirements

and the major market, distant signals policy (including the February 15 grandfathering date). That notice, while not published in the Federal Register, was unusually well-publicized.[7] Significantly, none of the petitioners assert that they were unaware of the February 15 grandfathering date, and it would strain credulity if they were.[8]

21. *Good cause for effectiveness upon publication.*—Having determined upon a grandfathering date earlier than the date of publication in the Federal Register, good cause existed for making the rule (sec. 74.1107) effective upon publication in the Federal Register. We could have followed normal procedure and waited until 30 days after publication in the Federal Register to proceed against systems commencing distant signal operation in the top 100 markets after February 15, 1966, and continuing after the effective date. But this would not have served any useful purpose or the public interest. Since grandfathering is pegged to the February 15 date, orderly procedure and the desirability of avoiding disruption as much as possible called for prompt Commission action against any system commencing operation after that date in violation of the rules, rather than the Commission waiting passively on the sidelines for the 30-day period to expire. Here again, this would be true whether the grandfathering date was February 15 or some earlier date.[9]

22. *The issue of appropriate notice.*—Our action was not taken without adequate prior notice to potential CATV operators and local franchising authorities. The notice of inquiry and notice of proposed rulemaking in docket No. 15971, issued on April 23, 1965, and published in the Federal Register (30 F.R. 6078), put all persons on legal notice that the Commission might take action of a substantially similar nature. We set forth at some length the subject and issues involved in CATV operations "in areas with potential for independent stations," pointing out that: "Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programing sources because of overshadowing by three network services from nearby communities" (notice, 1 FCC 2d 453, at 471). In order to be "in a position to take definitive action," we specifically invited comment on a proposed rule to "prohibit the extension of the signal of any television station beyond its grade B contour into a community" located in such areas "without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community" (1 FCC 2d at 472). Further, we

[7] For 2 or 3 weeks just before the notice was issued the Commission had received a flood of letters and telephone calls from members of the public and Congress on behalf of constituents, which reflected widespread knowledge in the CATV industry that the Commission was about to act in this proceeding. On Feb. 15, the day the notice was issued, the Commission held a press conference on the notice, which was well-attended by members of the press and other interested persons in the industries involved. The provisions of the notice were widely reported both by the general press and by the trade press. On Feb. 15 and within the next few days the Commission distributed almost 5,000 copies of the notice to persons who requested copies or otherwise inquired as to the status of the proceeding.

[8] The National Community Television Association's newsletter of Feb. 18, 1966, sent to all the members of the association, which include petitioners, discussed in great detail the Commission's public notice, referred specifically to the Feb. 15 grandfathering date, and attached the text of the notice.

[9] Similarly, had we decided upon a later grandfathering date such as the date of publication in the Federal Register, the foregoing discussion in pars. 13–21 would be pertinent and would constitute good cause for immediate effectiveness of the sec. 74.1107 upon publication.

indicated that this aspect of the proceeding might be spun-off for early determination (pars. 50, 67, 1 FCC 2d at 472, 477).

23. We also invited "counterproposals as to possible alternative measures" and requested comments on "the proposals of petitioners" (1 FCC 2d at 476). The proposals of the rulemaking petitioners, which were described in the notice (1 FCC 2d at 454–463), included requests that the Commission: "adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the stations' signals to serve other areas except upon prior consent of the Commission" (1 FCC 2d at 457); "stay immediately the commencement of operations by CATV's in those areas which now or in the near future will be served by three or more commercial stations pending the adoption of final rules to this effect," for the asserted reason that "once CATV franchises are granted in the larger markets and construction is commenced pursuant to those grants, the Commission will in fact have lost effective control of television allocations in those areas" because the "practical and legal difficulties * * * in attempting to reverse this situation would be virtually insurmountable" (1 FCC 2d at 462); "stay * * * microwave grants for CATV use" pending the adoption of a rule which would "permit a signal to be carried by CATV only if the community is located within a prescribed signal contour of the station carried, or is closer than a specified distance from the station," suggested to be "the grade B contour of the station carried, or a distance of 80–90 miles" (1 FCC 2d at 463, footnote 11); and "put on notice all persons who now operate or who propose to operate CATV systems that CATV operations, whether or not microwave relay is used, will be subject to regulation, and that some CATV systems may be required to modify or cut back their operations" (1 FCC 2d at 463).

24. As a further matter, the counterproposals which were submitted in the comments (and to which all parties were given an opportunity to respond) went directly to these matters. We have summarized these comments on paragraph 50 and the proposals made therein in the appendix B to the second report (see 31 F.R. 4565–4566), and will not repeat them here. The proposals of the American Broadcasting Co. (ABC), Westinghouse Broadcasting Co., Association of Maximum Service Telecasters (AMST), Midwest Television, Inc., and others clearly dealt with paragraph 50 of the notice and with the rules finally adopted.[10]

[10] Thus, ABC urged "the adoption of a rule prohibiting any person from transporting the signal of a TV station beyond its grade B contour into a community within the range of four or more commercial grade A assignments and receiving grade A or better service from three or more commercial TV stations, stating that such a rule would apply basically to all but three of the Nation's top 100 markets * * *" (id. at p. 4566). AMST proposed the rule "that no CATV system shall be permitted to extend the signal of any television broadcast station beyond its grade B contour except upon a clear and full showing * * * that the operation of the CATV system, taken together with the operations of all other CATV systems operating or franchised or which are being proposed in the area in question, would not pose a substantial threat to the maintenance or the expansion of any existing UHF station or the development of new UHF service in the area." AMST also urged that the foregoing rule should be made effective immediately upon its publication and should be made applicable to all CATV systems proposed on or after Apr. 23, 1965, the date of the release of the Commission's first report and order and its notice of inquiry and notice of proposed rulemaking. It stated that an alternative would be to apply the rule to all CATV systems operating on the date of publication of the rule which thereafter substantially expand their lines or the number of their subscribers or which increase the number of stations carried (ibid.).

25. We stressed the factor of "notice" in the notice itself, so that persons proposing to operate CATV systems and franchising authorities would take account of the pending rulemaking in planning their future actions. We stated (1 FCC 2d at 477): "We believe it appropriate, as requested by one of the petitioners, to put all persons who now operate or propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." We concluded the portion of the notice dealing with proposed Commission action on CATV in major markets and overshadowed areas by stating (1 FCC 2d 472): "Finally, we believe that franchising authorities will give due regard to the fact that the matter is thus under Commission consideration."

26. There is no unusual variance between the proposals made in the notice and the provisions of section 74.1107. The requirement for evidentiary hearing merely sets forth the procedure for making the showing proposed in the notice. The use of the 100 largest television markets, as ranked by ARB, delineates the "areas with potential for independent stations"; with a few minor exceptions these markets constitute the "areas with four or more commercial channel assignments."[11] The use of the grade A contour, which was suggested by several parties to the proceeding (second report, 2 FCC 2d at 791, 792), is a reasonable means of identifying not only "overshadowed" areas but also the area where CATV operations might have the severest impact on UHF stations in major markets (second report, footnote 63, 2 FCC 2d at 783). The questions of "effective date" and "grandfathering" were implicit components of the course of action proposed by the notice, which expressly noted and called for comments on the petitioners' requests for an immediate stay on the commencement of new operations pending determination of the merits because the "practical and legal difficulties" in subsequently "attempting to reverse the situation would be virtually insurmountable" (1 FCC 2d at 462, 476). As a further matter, the proposals or counterproposals submitted by the parties (par. 24 above) are also pertinent, although we think reliance upon them is unnecessary. See *Owensboro-on-the-air* v. *F.C.C.*, 262 F. 2d 702 (C.A.D.C.), cert. den. 360 U.S. 911. Accordingly, the promulgation of section 74.1107 was preceded by sufficient legal notice within the meaning of section 4(a) of the Administrative Procedure Act.

27. *Conclusion.*—Unlike the ordinary request for stay which seeks to preserve the status quo pending the outcome of a determination on the merits, a grant of the stay relief sought by petitioners would permit them and untold other CATV systems to irrevocably alter the status quo. Apart from petitioner Buckeye, it is not alleged that any of the

[11] ARB market rankings are widely used by the television industry and have been used by the Commission in other rulemaking proceedings. See, e.g., notice of proposed rulemaking and memorandum opinion and order in docket No. 16068, 30 F.R. 8166; public notice No. 60894, Dec. 18, 1964. The fifth report and memorandum opinion and order in docket No. 14229, 2 FCC 2d 527, promulgating a revised table of UHF television channel assignments, summarized the assignments made in the top 100 markets, as ranked by ARB, as follows (2 FCC 2d at 551): "Thus, with minor exceptions, the top 25 markets have 6 or more unreserved assignments; the 26th to 75th markets have 5 or more unreserved assignments; the 76th to 100th markets have 4 or more unreserved assignments; and the 101st to 150th markets have 3 or more unreserved assignments." See also, fourth report and order in dockets Nos. 14229 et al., 30 F.R. 7711.

petitioners commenced new distant signal service in the top 100 markets between February 15 and March 17, or to date. Rather, petitioners seek a stay of section 74.1107 in order to commence new service which is not now being provided to subscribers. For the very reasons which led us to select the February 15 grandfathering date and to make section 74.1107 effective upon publication, it follows a fortiori that a stay would be unwarranted and contrary to the public interest. Indeed, in view of the much longer time period involved, the potential irreparable injury to the public would be magnified many times. By completion of the judicial review process, the operating systems in the 100 top markets would be too numerous and extensive to allow meaningful protection of the public interest through section 74.1107 even if its validity is sustained, as we believe it will be.

28. Petitioners have not shown any substantial likelihood of prevailing on the merits of their petitions for reconsideration. Nor have they shown any irreparable injury to themselves which would outweigh the public injury in the grant of a stay. It is asserted that considerable sums have been invested in obtaining franchises, preoperational expenses, and construction of system plants; that pole attachment rights from local utilities are affected and may be lost, as well as funds due on outstanding contractual commitments for plant equipment, performance bonds, etc.; and that franchise rights may be lost for failure to construct within time limits. But section 74.1107 does not preclude, or require a hearing for, construction or the commencement of operations limited to local signals or any other service not involving the carriage of distant broadcast signals. Nor does the section flatly prohibit the carriage of distant signals; it provides rather that "Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in full evidentiary hearing, determines that the requisite showing has been made." Since petitioners may obtain relief upon conclusion of the hearing, the mere requirement for hearing does not cause irreparable injury. *Virginia Petroleum Jobbers Assn.* v. *Federal Power Commission*, 259 F. 2d 921, 925 (C.A.D.C.).[12] There may well be, of course, some loss of potential subscriber fees in the interim. However, in the circumstances we cannot regard private injury of this nature as sufficient to overcome the crucial possibility of substantial irreparable injury to the public.

29. Moreover, if application of the hearing requirement of section 74.1107 would be unduly inequitable or inappropriate in the unusual situation, a waiver can be sought. Petitioners point out that because of the distances between stations in some hyphenated markets, a station may be considered a distant signal in its own market. Or a system may be required to carry the grade B signals of VHF stations in a community but be precluded, without hearing, from carrying a low-

[12] If the franchises impose some time limit within which distant signals must be carried, petitioners have not shown that relief cannot be obtained from the franchising authorities for a delay occasioned by factors beyond their control. As noted in par. 25 above, our April 1965 notice expressly cautioned franchise authorities as to the possibility of Commission action in this area. The Federal regulation is, in any event, controlling.

powered UHF station in the same community.[13] There may be instances, of course, where a hearing is not necessary to protect the public interest and where strict application of the rule would produce anomalous results.[14] We think, nevertheless, that the criteria of section 74.1107 generally reach the situations of concern (see second report, pars. 118–127, 144; footnotes 54, 57; 2 FCC 2d at 772–777, 783). While exceptions may be made for good cause shown, this should be upon petition for waiver which will permit Commission consideration of the particular circumstances prior to the commencement of distant signal operations.

30. In sum, we think that the rules are valid and that the public interest requires that they be continued in effect. The rules cannot be simply ignored by persons who disagree or believe that an exception should be made in their instance. The proper procedure is to obtain a court stay of the effectiveness of the rules or a waiver from the Commission. Those who commence operation in violation of the rules, as a substitute for either procedure, do so at their own risk and will be responsible for any disruption to the public caused by the cease and desist and enforcement procedures which the Commission will be forced to pursue. Such operations will have to stop prior to Commission consideration of the merits and will not be taken into account in that consideration.[15]

31. In light of the foregoing, *It is ordered*, This 25th day of May 1966, that the petitions for stay *Are denied*.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. I would grant the petitioners' requests to stay the effectiveness of the Commission's CATV rules pending action on their petitions for reconsideration, until final adjudication of appeals from the second report and order, or action by Congress, whichever should occur first.

I disagree with the Commission's finding that there is little likelihood of petitioners' prevailing.

There are presently six bills pending in Congress with respect to regulation of CATV, H.R. 7715, H.R. 12914, H.R. 13286, H.R. 14201, H.R. 14454, and S. 3017. Hearings have been held on four of these

[13] We note, however, that the community of the VHF stations may be a separate major market, thus bringing into play the considerations discussed in footnote 60 of the second report, 2 FCC 2d at 786. In other words, protection of the public interest may necessitate some appropriate temporary relief as to the VHF signals rather than waiver of the rule to permit carriage of the UHF signal without hearing.

[14] We note that petitioners challenge the use of the predicted grade B contour as a measure of a distant signal. However, the use of propagation curves to measure television service contours is customary in Commission proceedings and has been judicially recognized as valid. *Wilton E. Hall and Greenville Television Co.* v. *F.C.C.*, 237 F. 2d 567, 573–575 (C.A.D.C.). Under the rules, the predicted grade B contour may be refuted by an adequate showing of the actual contour. The availability of signals through the use of ordinary home receiving equipment is entirely different, we believe, from the situation where signals would not be available to the public but for the use of highly sophisticated CATV equipment which may include a tall antenna structure placed on the highest elevation in the area. *Frank K. Spain d/b/a Microwave Service Co., Tupelo, Miss.*, 2 FCC 2d 905, 907–908. See also second report, footnote 65, 2 FCC 2d at 783.

[15] For these reasons, and those set forth in our order of Apr. 27, 1966, in docket No. 16551, Buckeye's petition for stay of the effectiveness of the rules pending final orders determining their validity and its petition for waiver (file No. CATV 100–3) will be denied. See also FCC 66–449 and FCC 66–455, adopted this day.

bills by the House Interstate and Foreign Commerce Committee (H.R. 7715, H.R. 12914, H.R. 13286, and H.R. 14201).

I believe it is unsound to second-guess the Congress, and now conclude that no changes will be made in the Commission's proposed bill, H.R. 13286. With substantive changes or enactment of a different bill, the Commission's present CATV rules could be nullified.

Moreover, in face of serious questions as to the Commission's having jurisdiction over CATV and validity of the rules recently promulgated, there is no certainty that the rules will be upheld in pending court appeals.

In my opinion, the Commission does not presently have jurisdiction over CATV and, consequently, the rules are invalid for this and other reasons set forth in my dissent to the Commission's decision in docket No. 16551, which dissent is incorporated herein by reference and attached hereto.

I vote to stay the effective date of the rules until their validity has been finally adjudicated by the courts or until Congress has enacted CATV legislation.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. In the absence of congressional action, I agree with the respondent's contention that the Commission does not have jurisdiction over CATV systems and that, consequently, the rules adopted in the second report and order are invalid. Even assuming, arguendo, that the Commission does have jurisdiction, I believe that section 74.1107 of the rules is invalid because it contravenes section 4(c) of the Administrative Procedure Act, which provides that a substantive rule not be made effective in less than 30 days after required publication "except as otherwise provided by the agency upon good cause found and published with the rule."

Section 74.1107 was made effective immediately upon the required publication. A recitation of good cause found was made on the basis of injury to the public from continued implementation of service extending grade B signals.

In my opinion, injury to the public was not supported with any factual indication or showing and was purely unfounded speculation. There appeared to be more indication of benefit, rather than injury, to the public from the extended service in question. Consequently, the recitation of good cause found was, I believe, a nullity under section 4(c) of the Administrative Procedure Act, and the immediate effective date of the rule rendered it invalid.

The February 15 cutoff date of section 74.1107(d) appears in practical operation to be a retrospectively applied effective date of the rule itself and, accordingly, a further ground for invalidity of the rule.

Moreover, I believe that section 74.1107 is not valid because adequate notice was not given on the substantive provisions imposed on implementation of service in the top 100 markets. Also, the mandatory hearing requirement seems extremely arbitrary and excessively burdensome on a CATV applicant. A serious question exists as to what kind of possible showing a CATV applicant could make to pre-

vail against the fears expressed by the majority in the second report and order.

A basic fallacy of the CATV rules is the rationale which the Commission used to justify its assertion of jurisdiction in order to effectuate their promulgation. The rationale is on a basis so broad as to appear to encompass any kind of interstate communication and thus go beyond delegable powers of Congress. Congress can, of course, delegate certain of its powers to the Commission, but inherent in such delegation is specification of adequate guidelines. The CATV rulemaking without congressional delegation of power but under jurisdiction asserted by the Commission was, I believe, so lacking in requisite guidelines as to make it unconstitutional.

[This document is not part of the certified record in this case but all parties agree that it should be included in this Appendix for the Court's convenience.]

FCC 67-34

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF SUBPART L, PART 91, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE BUSINESS RADIO SERVICE FOR MICROWAVE STATIONS TO RELAY TELEVISION SIGNALS TO COMMUNITY ANTENNA SYSTEMS	Docket No. 14895
AMENDMENT OF SUBPART I, PART 21, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE FOR MICROWAVE STATIONS USED TO RELAY TELEVISION BROADCAST SIGNALS TO COMMUNITY ANTENNA TELEVISION SYSTEMS	Docket No. 15233
AMENDMENT OF PARTS 21, 74, AND 91 TO ADOPT RULES AND REGULATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS	Docket No. 15971 (RM Nos. 636, 672, 742, 755, and 766)
AMENDMENT OF SECTION 74.1103 REQUIREMENTS RELATING TO DISTRIBUTION OF TELEVISION SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS	RM 1017
AMENDMENT OF SECTION 74.1107(a) OF THE COMMISSION'S RULES AND REGULATIONS CARRIAGE OF DISTANT SIGNALS IN TOP 100 MARKETS	RM 1025

MEMORANDUM OPINION AND ORDER

(Adopted January 5, 1967)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER DISSENTING AND ISSUING STATEMENTS; COMMISSIONER COX CONCURRING IN THE RESULT AND ISSUING A SEPARATE STATEMENT; COMMISSIONER WADSWORTH ABSENT; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it a number of petitions for reconsideration of the *Second Report and Order*, issued in this proceeding on March 8, 1966 (31 F.R. 4540).[1] Except for some respects in which

[1] App. A contains a list of the parties who have filed petitions for reconsideration, or oppositions. Dismissal of the petition for reconsideration, filed by Courier Gable Co., Inc., is sought on the ground that it has not given good reason under sec. 1.106(i) of the rules for not participating in the proceeding at earlier stages. Because of our desire to be fully informed as to the views of all interested persons in rulemaking of this nature, we have considered the Courier petition and will deny the request for dismissal.

modification of the rules is sought, we have decided that the petitions should be denied. To a considerable extent, they raise no new issues and advance no new arguments for our consideration. We will not go over old ground again, but will limit this opinion to those matters which warrant additional treatment and to the modifications in the rules.

I

2. The contentions concerning the Commission's jurisdiction are essentially repetitive of arguments fully considered in our previous opinions.[2] We shall treat in greater detail the question of whether the rules are inconsistent with constitutional and statutory requirements of free speech. See, e.g., *Back Mountain Telecable, Inc.*, 5 F.C.C. 2d 735. Such inconsistency is urged on the ground that they interfere with the right to receive programs and direct the conduct of CATVs in deciding what programs shall and shall not be carried. Assuming that the provisions of section 326 of the Communications Act, 47 U.S.C. 326, are applicable to CATVs, we see no violation of either the first amendment or that statutory provision.

3. It is well established that reasonable regulation of radio transmissions, if consistent with the public interest as that term is defined taking into account the overall purposes and provisions of the act, is not violative of the right of free speech. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *Lafayette Radio Electronics Corp.* v. *United States*, 345 F. 2d 278 (C.A. 2, 1965). This principle has been applied to the imposition of carriage and nonduplication restrictions on CATVs similar to those finally adopted in the *Second Report and Order*. *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963), cert. den. 375 U.S. 951; *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965).

4. While it is true that those cases dealt with radio licensing, we have now held that CATVs provide an extension of a broadcast service; see also *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 96 U.S. App. D.C. 211, 217, 225 F. 2d 511, 517 (1955). If, as we believe, Congress has given us the regulatory authority we have asserted, there is no reason why the free speech principles should apply differently to those CATVs which derive their signals off-the-air than to those which use licensed radio.[3] The public-interest con-

[2] The contentions concerning the validity of the "grandfathering" date of Feb. 15, 1966, our decision to make the rules effective upon publication in the Federal Register, our failure to hold a full evidentiary hearing before promulgating the rules, and the general adequacy of notice of rulemaking have all been discussed in the memorandum opinion and order, released May 27, 1966, denying petitions for stay of the effective date of the rules, FCC 66-456, 3 F.C.C. 2d 816. It is contended further that sufficient notice was not given that "final" rules, rather than "interim" action pending a resolution of pt. II of the rulemaking, would be adopted for CATV operations in major markets. While the *Second Report* dealt only with pt. I and pars. 49 and 50, we examined the comments on pt. II and concluded that they added very little to the comments on pars. 49 and 50, certainly nothing which would permit us to adopt substantive rules resolving the policy issues in this area. We decided that evidentiary hearings were necessary and our major market procedure operates pending a resolution of the issues by this process rather than by the rulemaking process.

[3] See also *United Artists Television, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y., decided May 23, 1966), explaining in detail why CATVs are not merely reception facilities and that they do transmit radio waves, albeit by wire.

siderations remain the same, as does the impact upon speech. We are not concerned here with the sort of "sweeping suppression of home subscription television" which was stricken down on free speech grounds in *Weaver* v. *Jordan*, 49 Cal. Reptr. 537, 411 P. 2d 289 (1966), but rather with limited regulation.

5. So far as our rules go beyond the original carriage and nonduplication requirements to prohibit extending certain signals beyond their grade B contour without a hearing, it can hardly be contended, in light of the existing authorities, that the right of free speech includes the right of a party subject to the act's jurisdiction (here an interstate communicator by wire) to extend the service area of a television station beyond the area authorized by the Commission, in a manner inconsistent with the public interest. Thus, the CATV system has no more constitutional right to extend the service area of a station in a manner inconsistent with the public interest than the station would have the constitutional right to increase its height and power in violation of our rules or the public interest. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); see sections 303(h) and 307(b) of the act.

6. One other contention on the question of the Commission's authority warrants brief discussion.[4] It is urged that the Commission cannot rely upon any of the radio licensing provisions of title III of the act, on the theory that they do not apply to wire transmissions but only authorize regulation of radio and television stations licensed under title III. This approach parallels the argument made, and rejected, in *Carter Mountain*, supra, that the Commission was applying "broadcast regulation" to common carriers.

7. The Communications Act does not so compartmentalize the Commission's functions. On the contrary, it created one agency "for the purpose of regulating interstate and foreign commerce in communication by wire and radio" by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communications * * *" (sec. 1, 47 U.S.C. 151). When a new development constitutes an extension of radio or television service, as CATV does, it is unrealistic to treat it as though it were totally unrelated.

8. Congress "* * * did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalog of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even

[4] We think no more than mention need be made of the contention that the rules deprive parties holding local franchises of property without compensation. Federal regulation of businesses engaged in interstate commerce is not subject to attack on that ground. *Nelson Brothers Bond & Mortgage Co.* v. *Federal Radio Commission*, 289 U.S. 266, 282. The contention that systems in operation prior to the issuance of the notice of proposed rulemaking have a constitutional right to be "grandfathered" is also patently without merit. Rules adopted after full rulemaking procedures may validly be applied to existing systems. We have, however, repeatedly indicated our intention to avoid undue disruption to the public in this connection.

in fields where the subject matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219-220. We cannot adopt a view of the act which would frustrate both the congressional intent and the more effective use of radio in the public interest.

II

9. We turn now to a discussion of the petitions as they bear upon the specific rules. Our discussion will treat in turn the aspects of: (1) Carriage, (2) nonduplication, (3) the major market, distant signals policy, and (4) procedure and miscellaneous changes.

1. CARRIAGE

10. *Satellites.*—The rules adopted in the *First Report* provided that where a CATV system operates within the grade B or higher priority contour of both a satellite station and its parent station, carriage of one would relieve the system of any obligation to carry the other. In light of contentions that satellites should be treated like any other station in accordance with the prescribed priorities, the rules adopted in the *Second Report* deleted this exception. It is now urged by petitioners that the amendment went too far, since substantial duplication of programing would result if the system is required to carry both the satellite and the parent stations. The rules will be amended to provide that where a system operates within the grade B or higher priority contour of a satellite and its parent station, the system need not carry both stations but shall carry the station having the higher priority and may select between stations of equal priority. This refinement retains the essential purpose of the earlier amendment and will, we think, better serve the public interest. Accordingly, sections 21.712(d)(4), 74.1033(b)(4), 74.1103(b)(4), and 91.559(b)(4) are added to the carriage provisions of the rules in the attached appendix B.

11. *The Grade B Contour.*—A CATV system is required, upon request, to carry the signal of a station which puts a grade B or better contour over any part of the community, unless the priority scheme set forth in section 74.1103 (a) and (b) requires an exception because of limited channel capacity. We also noted in the *Second Report* that "carriage will not be required where a sufficient showing (in a sec. 74.1109 petition) is made that a predicted signal is not in fact present in the community * * *" (footnote 40, par. 68). The Association of Maximum Service Telecasters (AMST) urges that a station should be carried, upon request, "everywhere in its predicted grade A contour, irrespective of its actual signal strength, as well as everywhere in its predicted grade B contour, subject to a showing of a different actual grade B contour * * *" (AMST petition for reconsideration, p. 14).[5]

[5] Several modifications urged by AMST simply renew requests previously considered in the *Second Report*. Nothing new has been presented to warrant further discussion here. Wichtex Radio & Television Co., Inc., asserts that CATV systems should not be permitted

12. We recognize that there are considerations favoring the use of the predicted grade B contour. Since the requirement for carriage of local stations, in a very real allocations sense, furthers our responsibility to prescribe the areas to be served by television broadcast stations (sec. 303(h)), the use of an allocations tool—the predicated grade B contour—might be appropriate.[6] Further, there are legislative developments which appear to tend in the direction of a definitive standard. See, e.g., House Report No. 2237 on H.R. 4347, 89th Congress, 2d session, pages 2, 81, 83. See also footnote 15, infra.

13. We further recognized in the *Second Report* that the outcome of the copyright matter could have a significant effect on our regulations in the CATV field (*Second Report*, 2 F.C.C. 2d at 768–769). However, the precise direction and extent of any appropriate regulatory changes cannot now be foreseen, as they will depend to a large extent upon the specifics of the copyright aspect which have not yet been definitively resolved. In the circumstances, and since the development of new propagation curves (docket No. 16004 (30 F.R. 6651)) and modernization of specifications for measurements are being explored, we do not think that the public interest would be served by changing the rules at this point. Accordingly, while the instances in which a waiver is warranted in accordance with footnote 40 of the *Second Report* are likely to be rare because of the substantial supporting showing required, we will continue to consider supplemental showings made as to actual contour as provided in section 73.684(f) of the rules. If the processing of such petitions for waiver should become an undue administrative burden or if any other pertinent change in circumstances occurs, we will, of course, reexamine the matter.

14. Moreover, in light of our ruling in *Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 798, 800, that carriage is required where any part of the community of the system falls within the pertinent contour, we will clarify the carriage provisions by making this construction explicit. The phrase "the system or the community of the system is located in whole or in part" will be substituted for the words "the system operates, in whole or in part" in sections 21.712(c), 74.1033(a), 74.1103(a), and 91.559(a). The phrase "in whole or in part," as used in the exclusivity provisions, is also to be construed so as to require exclusivity on a system operating in a community, part of which falls within the grade B or higher priority contour of a station. Thus, in the case of a system operating in an incorporated community, the

to alter or delete any portion of distant broadcast signals carried on the cable, or to substitute CATV-originated advertising. Apart from the fact that the nonduplication rules may require deletion of programs duplicating local signals, the subject of program origination by CATVs is included in the Commission's legislative recommendations and may be affected by the outcome of the copyright question. In this posture, we do not think it appropriate to consider the Wichtex request on the merits here.

[6] In view of the fact that signal strength at various distances from a television station varies with time, location, season, weather conditions, terrain, and other factors, the use of estimated contours is good for overall allocation purposes but presents problems when predicting the service from a particular station in a particular area. See sec. 73.683, report of the working group for the engineering conference, in docket No. 16004, on the development of new FM and TV propagation curves, dated Apr. 12, 1966. However, examination of the question of actual signal strength in the community or actual contours is necessarily minute and often futile, as it is very difficult to make a valid showing through measurements over a sufficiently wide area and a long enough period of time. Moreover, where a community comes within the predicted grade B contour of a station, the station's signal is normally readily available for reception by the sophisticated CATV equipment, utilizing as they do choice receiving sites.

question of carriage and nonduplication rights turns on whether any part of the community falls within the contour; in the case of a system in an unincorporated area where it may be difficult to delineate community boundaries (see discussion within, pars. 38–39), carriage questions will be resolved on the basis of whether the system itself is operating, in whole or in part, within the contour.

15. *Copyright.*—Finally, in view of our previous discussion on this point (par. 108, *Second Report*), we shall refer only briefly to copyright argument that has been advanced that in light of the district court's decision in the *United Artists* case,[7] systems should not be required to carry local signals unless afforded complete copyright immunity by the stations requesting carriage. As stated in paragraph 108, our rules are based on the present situation in which the CATV system operates without regard to copyright clearance. We again state that our actions should not be taken as in any way affecting the copyright suit. As to the above argument, the short answer is that it is up to the system to determine whether to follow the district court's decision or the present industry practice, but it cannot properly obtain a waiver of our carriage rules when it follows a selective policy in this respect (i.e., ignoring copyright in the case of distant signals and purporting to follow it as to local signals). We believe that in light of present industry practice, no revision of our rules is needed, and that we should, therefore, deal with any situations of this sort by waiver, when and if they arise. Generally, any revisions of our rules in this respect must await further developments.

16. A further question has arisen as to whether a local station can request carriage and at the same time reserve any rights which the station itself may have to proceed against the system for copyright infringement. We think that this would be manifestly unfair to the system and that in requesting carriage the station must confer such authorization as may be required from it, so long as the carriage request is outstanding. All that the station can properly reserve is the right to proceed against the system with respect to any programing which is carried after the system has been notified that the request for carriage has been revoked.

2. NONDUPLICATION PERIOD

17. The National Association of Broadcasters (NAB), AMST, and several individual broadcasters urge that the time period for nonduplication should be restored to 15 days before and after the local broadcast, as we originally provided in the *First Report*[8] (38 FCC 683). It is asserted that the present same-day nonduplication pro-

[7] *United Artists Television, Inc.* v. *Fortnightly Corporation*, 255 F. Supp. 177, S.D.N.Y., issued May 23, 1966.

[8] Some of the parties claim that the reduction to same-day nonduplication was made without prior legal notice. However, we stressed both in the *First Report* (38 F.C.C. 683, 686–687) and in the notice in docket No. 15971 (1 F.C.C. 2d 453, 465) that the conclusions of the *First Report* as to carriage and nonduplication were subject to reconsideration in the further proceeding. We repeatedly stated that the rules would not be applied to the CATV industry as a whole until we had had an opportunity to examine the overall subject of carriage and nonduplication in light of our further exploration in docket No. 15971. The proceedings in dockets Nos. 14895 and 15233 were not terminated by the *First Report*, but were instead held "open for final action in conjunction with our action upon the overall subject of carriage and nonduplication" (38 F.C.C. at 687). The length of the nonduplication period was very much at issue in the comments filed in the further proceeding. In the circumstances, we do not think that the claim of lack of notice is well taken.

vision is inadequate because delayed broadcasts occur most frequently in one- and two-station markets and the burden of seeking additional protection under the ad hoc procedures of the rules falls on those broadcasters least able to bear it. The NAB further states that the period for nonduplication of syndicated and film programing should be geared to the term of the contract between the local station and the film supplier. As a minimum, it urges, exclusivity should be afforded until after the first run of any particular program in a series or film package or for 1 year, whichever occurs earlier.[9]

18. Our decision to provide by rule for same-day nonduplication was made after full consideration of matters urged by petitioners, and constituted, in our judgment, a fair compromise of the competing interests pending a resolution of the status of CATV under the copyright law. *Second Report*, 2 F.C.C. 2d 725, 747–749, 768–769. Not only have no new arguments pertinent to the rule (as against individual situations more appropriate for waiver) been presented, but we would deem it inappropriate, for the reasons indicated in paragraph 13, to undertake a reexamination at this point when the important and relevant copyright considerations are in a state of flux. As already noted, since the *Second Report*, the district court decision in the *United Artists* case has been issued and is now on appeal in the Second Circuit. Moreover, the House Judiciary Committee has reported favorably on a copyright bill which would afford much more exclusivity protection than the provisions of our rules, if it were to be enacted. House Report No. 2237 on H.R. 4347, 89th Congress, 2d session, pages 81, 86–87. In the current circumstances, we adhere to our judgment that the public interest is served by our rule affording the local station exclusivity on the day of its broadcast of the program. If changes become appropriate upon a final resolution of the copyright matter or if revisions are needed upon the basis of our experience with this provision, we shall move promptly to implement such revisions.

19. A number of petitioners, both stations and CATV systems, have set forth their particular, individual circumstances as a basis for urging some change in sections 74.1103 and 74.1107 of the rules. While we see no reason to modify the rules in light of their contentions, this is not determinative of the question of whether petitioners could obtain affirmative relief or a waiver of the rules pursuant to a petition filed under section 74.1109. The ad hoc procedures are the appropriate vehicle for obtaining full consideration of individual situations.

20. There is, however, one unusual problem which we shall discuss because it may be common to several stations. WBEN, Inc., licensee of station WBEN-TV, Buffalo, N.Y., has filed a petition for rulemaking (RM–1017) to revise section 74.1103(f) to afford nonduplication protection for U.S. network programing which is presented by

[9] The Commission has also considered the recommendations of the Committee for the Full Development of All Channel Broadcasting, adopted at a meeting of its Executive Committee on Mar. 26, 1966. The committee's recommendations are to the effect that: (1) CATV systems should be required to make clear showing that they would not pose a substantial threat to the development of new and/or existing UHF stations, (2) the CATV rules should apply equally to all stations regardless of market size, and (3) the nonduplication period should be 15 days before and after the local broadcast. We believe that the spirit of the first recommendation is inherent in the *Second Report*, as well as in recent decisions on specific cases. The latter two recommendations have been rejected for the reasons stated herein (pars. 18, 23).

foreign stations prior to the day of its initial network presentation in the United States. WBEN states that during a typical week in March 1966 a total of 64 hours of network programing presented by Buffalo stations was duplicated by Canadian stations carried on the CATV system of Courier Cable Co. in Buffalo. The same-day nonduplication provision would enable the Buffalo stations to request exclusivity only as to 37½ hours. The remaining 26½ hours of duplicated network programing, being prior calendar-day duplication, would be beyond the purview of section 74.1103 of the rules. It is requested that section 74.1103(f) be amended to provide additionally that a CATV system shall, upon request of the local station, "refrain from presenting any network program proposed to be broadcast by such station from a foreign station at any time prior to the time of broadcast by such station where such program is released on the foreign station prior to the time of its initial presentation on a domestic network * * *." [10]

21. The problem does not appear sufficiently widespread to warrant the institution of rulemaking proceedings at this time, since it affects only those stations and CATV systems operating in the vicinity of the Canadian border. However, the *Second Report* states with respect to same-day nonduplication (2 F.C.C. 2d at 749):

> * * * we will consider requests by local stations and CATV systems for different treatment on an ad hoc basis, pursuant to the summary procedures discussed in paragraph 97 where possible, or by evidentiary hearing if necessary. Thus, the station which receives its network programing by mail, or the station or system which faces some other unusual problem, can bring its situation to our attention for such relief as may be appropriate in the individual circumstances and warranted by the public interest.

The Canadian prerelease problem presents the kind of unusual situation we had in mind. The rule is intended to provide exclusivity for network programing presented on the same day as the domestic live network presentation (2 F.C.C. 2d at 747, 749) and this consideration will be afforded substantial weight in ruling on any petition under section 74.1109 for the imposition of additional requirements necessary to achieve the basic purpose of the rule.

22. *Translators.*—In the *Second Report* we accorded fourth priority for purposes of carriage to commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power and provided for nonduplication protection against more distant signals. However, we excepted such translators from the carriage requirement where the system was carrying the signal of the originating station. A question has arisen as to whether the originating station is entitled to nonduplication protection if the system is located beyond the grade B contour of that station. In allowing this exception, the Commission intended that the originating station would have the same exclusivity as to programing to which the translator station would otherwise have been entitled, unless the originating station has higher priority rights of its own. The rules will be modified to make this clear in the attached appendix B (secs. 21.712(d)(3), 74.1033(b)(3), 74.1103(d)(3), and 91.559(b)(3)).

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[10] Supporting comments were filed by Brockway Co., KMSO-TV, Inc., Mt. Mansfield Television, Inc., Maine Radio & Television Co. and WLBZ Television, Inc., Great Lakes Television Co., Channel 9 Syracuse, Inc., King Broadcasting Co., and Storer Broadcasting Co. Total Telecable, Inc., and Courier Cable Co. filed oppositions to which WBEN, Inc., replied.

3. DISTANT SIGNALS IN THE TOP 100 MARKETS

23. The bulk of the requests for reconsideration concern the rules governing distant signals in major markets. Section 74.1107 provides that no CATV system operating within the predicted grade A contour of a television station in the 100 largest television markets (as ranked by American Research Bureau on the basis of net weekly circulation) shall extend the signal of a television station beyond the grade B contour of the station, except upon a showing in a hearing that the operation will be consistent with the public interest and, particularly, the establishment and healthy maintenance of television broadcasting service in the area. The hearing requirement does not apply to distant signals which were being supplied to subscribers on February 15, 1966.

24. It is asserted by various broadcast interests that the question of distant signals should be governed by a substantive rule, rather than a hearing procedure, and that the rule should apply across the board to all markets. Both CATVs and broadcasters challenge the use of the grade A contour, claiming that the area encompassed is either too large or too small, and proposing the use of census urbanized areas, the grade B contour, or some standard based on mileage. Challenge is also made to the use of the grade B contour as the measure of a distant signal, some urging a mileage standard and others suggesting a test dependent on whether the signal is actually receivable off-the-air. It is further asserted that the 100 largest television markets should not be selected upon the basis of American Research Bureau (ARB) net weekly circulation figures, but rather upon some other criteria, such as population figures of the U.S. Census Bureau. And, finally, petitioners seek modification or clarification of the provisions of section 74.1107(d) concerning geographical extension into new areas by "grandfathered" systems which were providing distant signals to subscribers on February 15, 1966.

25. In general, we adhere to our determination in the *Second Report* that, in light of present conditions, the public-interest questions raised by proposed CATV entry into major markets are appropriate for consideration in evidentiary hearing. We also adhere to our decision to distinguish between major and smaller markets by drawing the line for required evidentiary hearing at the 100th market. Here, again, we would be reluctant to explore any fundamentally different approach while the copyright question is being actively considered by the Congress and the courts and before the outcome is known. However, in view of the contentions of the parties concerning the details of the rules, it appears that further discussion of some aspects is warranted.

26. *Use of ARB Market Rankings.*—We treat first the contention that the 100 largest television markets should not be selected upon the basis of ARB net weekly circulation figures, but rather upon population figures of the U.S. Census Bureau, either the standard metropolitan statistical area (SMSA) or urbanized area ranking. Petitioners note that ARB is a private firm whose working data are not public, and that the market ranking of a community on the basis of net weekly

circulation of the largest station may vary substantially from the community's ranking on the basis of census figures. They also point out that in some hyphenated markets the distances between communities included in the market may be so great that application of section 74.1107 would be inappropriate or produce anomalous results.

27. We gave consideration to the use of census rankings when we decided upon the ARB net weekly circulation figures (NWC). While none of the alternatives is entirely satisfactory, the ARB NWC market rankings appeared preferable for our purposes. The important factor from our standpoint is the size of the population which could be reached by a television station. The service area of a television station usually extends well beyond the metropolitan or urbanized area of the particular community to which the station is assigned. The SMSA or urbanized area ranking does not indicate whether the surrounding area to be served by a television station is sparsely populated or contains other communities which are separated by rural areas but which cumulatively have a sizable population. ARB NWC market rankings reflect TV homes in the entire area served by a television broadcast station and, thus, are a better measure of the potential audience which might attract new stations.

28. While it may be appropriate to use census rankings for some purposes, we are not required to do so merely because the Census Bureau is a governmental rather than a private organization. ARB NWC market rankings are well known and widely used by the television industry. They have been used by the Commission in other rulemaking proceedings. See, e.g., notice of proposed rulemaking and memorandum opinion and order No. 16068, 30 F.R. 8166; public notice No. 60894, December 18, 1964. Moreover, with minor exceptions it is the top 100 markets, as ranked by ARB, which have 4 or more unreserved channel assignments under the fifth report and memorandum opinion and order in docket No. 14229, 2 F.C.C. 2d 527, 551, and which, therefore, provide the opportunity for independent stations.[11]

29. On the whole, the ARB NWC market rankings adequately cover the areas of concern. While special problems may arise in some areas, such as hyphenated markets, we think it better to deal with these situations on an ad hoc basis under section 74.1109 rather than to adopt a different standard which might entail other problems.

30. *The Grade A Contour.*—We also adhere to our determination that the predicted grade A contour is, for purposes of the rule, an appropriate criterion for measuring the area within which the importation of distant signals raises public-interest questions. It does not include the much larger areas falling within the grade B contour, as requested by some of the petitioners for reconsideration. Nor is it limited to the immediate environs of the principal community, as sought by others. But the grade A contour generally carves out the essential area upon which UHF operations in the market would usu-

[11] We have also considered using some other ARB criteria, such as its ranking based on homes viewing all stations in the market during all quarter-hours in prime network time. However, the NWC ranking affords a better indication of population in the case of overshadowed areas where outside stations may affect the audience for local stations in the market, and we see no offsetting advantages in the use of the prime time ranking. The markets which would be excluded from the top 100 if prime time homes were used in place of NWC have considerably more UHF activity than those which would be substituted.

ally be based. We recognize that the grade A contour may encompass some localities where, because of the particular circumstances, an evidentiary hearing appears unnecessary. We have already granted waivers of the hearing requirement in some such instances.[12] No standard suggested to us would precisely fit all the situations we are seeking to reach, to the exclusion of all others. The use of the grade A contour, coupled with the procedures for waiver, insures that all proposed distant-signal CATV operations in the area of apparent reasonable concern are brought before us for consideration and such action as may be warranted in the public interest in the particular circumstances.

31. *The Grade B Contour as the Measure of a Distant Signal.*—It is urged, particularly by Entron, Inc., that the Commission should substitute a mileage standard, such as 80 miles, for the grade B contour as the measure of a distant signal.[13] Petitioners point out that grade B contours vary from station to station. Because of the differences in VHF and UHF contours, a CATV system may be required to carry VHF stations in a community but be precluded from carrying UHF stations in the same community.[14] Or a CATV system may be required to carry VHF stations in a more distant community but be precluded from carrying a UHF station in a closer community.

32. We think that the grade B contour is a reasonable demarcation between a distant and a local signal. See section 303(h) of the Communications Act. We regard this contour as generally delineating the area within which service from the station can reasonably be expected. The carriage requirements as an allocation principle are geared to the grade B contour in order that the station may have access to all persons within this general service area. Beyond this point the CATV system is, in a real sense, extending the service area of the station by markedly changing the quality of the signal being received, and raising public-interest questions which are not resolved as of this time.

33. While the Commission might conclude that the public interest would be served by permitting an extension without evidentiary hearing in some instances, the adoption of an across-the-board mileage standard like 80 miles would appear to go too far and give rise to other problems. For example, it would create a gap between the carriage requirements of the rules and the signals for which evidentiary hearing or waiver is required. It would also increase the likelihood that a CATV operating in one major market could carry the signals of stations located in another major market. We agree in principle that VHF and UHF stations located in the same community should be treated alike insofar as carriage on the CATV system is concerned. But if that community is a separate major market, car-

[12] See, e.g., *Martin County Cable Co., Inc.*, 4 F.C.C. 2d 348; *Coldwater Cablevision, Inc.*, 4 F.C.C. 2d 351; *Chenor Communications, Inc.*, 4 F.C.C. 2d 354.

[13] In asserting that the rules are broader than necessary to cover CATV distribution of New York or Los Angeles independent stations, Entron misconstrues the rationale of the *Second Report*. The New York and Los Angeles stations were used merely as examples. The Commission's concern is with distant signals generally in major markets.

[14] Jackson TV Cable Co. has filed a petition for rulemaking (RM 1025) to amend sec. 74.1107(a) to provide that a UHF station may be carried without hearing where a VHF station in the same community is carried. A supporting statement was filed by Jerrold Corp. For the reasons stated herein, par. 33, the petition will be denied. We note further that waivers have already been granted to permit the carriage of UHF signals in some instances. See, e.g., *Athens TV Cable Co., Inc.*, FCC 66–953, released Nov. 7, 1966.

riage of the VHF stations may present threshold public-interest questions for evidentiary hearing. See footnote 69 of the *Second Report* and footnote 13 of the memorandum opinion and order, released on May 27, 1966, denying the petitions for stay (3 F.C.C. 2d 816, 827). We have every intention of administering the rules so as to avoid anomalous results. However, we believe that the waiver procedure, which permits prior Commission consideration of all relevant factors in the particular situation, will better accomplish this end than basing the definition of distant signal on a mileage standard which is not correlative to the grade B contour.[15]

34. Nor do we find merit in the contentions that certain refinements in, or exceptions to, the grade B contour standard are called for in the rules. Courier Cable Co., Inc. (Courier), asserts that the definition of distant signals should exclude signals which are regularly received off-the-air by viewers residing beyond the grade B contour of the station. In the alternative, Courier urges that in locating the grade B contour, the use of maximum power and antenna height by the station should be assumed. But, what is involved is, to a considerable extent, an allocations question, particularly where account is taken of the manner in which CATV changes the quality of the more distant signal and thus equalizes its reception vis-a-vis the clearly local signal. See paragraph 32, above; cf. note 69, *Second Report*. Further, the delineation of actual service is a complex matter, requiring thorough substantiation. Where, therefore, a system in a community within the predicted grade A contour of stations located in the top 100 markets proposes to bring in the signal of a distant station (i.e., to extend a signal beyond its grade B contour), it should not be permitted to do so, on the ground that it is not extending a distant signal but rather only carrying a signal which is being regularly received in the community, unless it has substantiated this ground either in a waiver petition or in a hearing. Courier's further contention that maximum height and power be assumed in locating the grade B contour ignores the very practical policy considerations at which the major market, distant signals doctrine is aimed. It would mean that situations raising serious public-interest questions would not come within section 74.1107, and that the type of situation described in note 69 of the *Second Report* would be multiplied manyfold.

35. *New Geographical Areas.*—Clarification is sought as to the applicability of section 74.1107 (a) and (d) to geographical extensions by "grandfathered" systems in major markets. Subsection (d) of section 74.1107 exempts from the hearing requirement of subsection (a) distant signals which were being supplied to subscribers on February 15, 1966, except where there is "any new franchise or amendment of an existing franchise to operate or extend the operations of the CATV system in the same general area." Subsection (d) further

[15] We recognize that it might simplify matters for all concerned if we were to prescribe a single mileage standard, reasonably approximating an average grade B contour, for determining whether a signal is "local" or "distant" for purposes of the CATV rules. But we would not undertake such a step without further comment from interested persons or prior to the resolution of the proceedings in docket No. 16004 concerning propagation curves (30 F.R. 6651). While no such delay in this proceeding is warranted, we do not mean to preclude the possibility of future exploration of this question in a separate proceeding if that should prove appropriate.

provides that the system shall not extend its "grandfathered" distant signal service to "new geographical areas where the Commission, upon petition filed under section 74.1109 * * *, determines that the public interest would be served * * * by appropriate conditions limiting the geographical extension of the system to new areas."

36. AMST and Telerama, Inc., request clarification as to what kind of extensions, in the general area comprising a main community and its suburbs, fall within the required hearing provisions of subsection (a) and what extensions are exempt under subsection (d), subject only to consideration upon petition under section 74.1109. AMST asserts that the dichotomy between the two was not made clear in paragraph 149 of the *Second Report*, which seems to indicate that subsection (a) would apply to an extension from a suburb into the main community but is silent with respect to an extension from one suburb to another. AMST takes the position that in a city or suburb of any size, an extension from one part of the city or suburb to another part of the same city or suburb is clearly an expansion into new geographic areas which should come within section 74.1107(a). On the other hand, Telerama contends that subsection (a) "should not be directed to the situation where a system is operating in a part of a suburb of a main community and attempts to add subscribers in the suburban area in which the system was intended to serve and for which the technical facilities were engineered."

37. We have already clarified this aspect to some extent in declaratory rulings and cease and desist proceedings instituted since the *Second Report* to enforce the provisions of section 74.1107(a). *Letter of May 2, 1966, to Telerama, Inc.* (Cleveland, Ohio), FCC 66-397, 3 F.C.C. 2d 585; *Mission Cable TV, Inc., et al.* (San Diego, Calif.), FCC 66-548, 4 F.C.C. 2d 236. In the Cleveland matter, Telerama urged that since the communities it was proposing to serve, though separate governmental subdivisions of the suburban area of Cleveland, were within the geographic area the system was engineered to serve (an area having a 20-mile radius), the extension was governed by subsection (d). The Commission ruled that subsection (a) applied to extensions to separate incorporated communities, stating (3 F.C.C. 2d at 586):

> It is important to note that the exemption and the related geographical extensions provisions of subsection (d) are limited to the specific community (including such additions as unincorporated suburbs) within which the system was franchised (if that were the case) and was operating on February 15, 1966. The term system in the first sentence of subsection (d) means the system in the specific community and not one operating generally in the area. Thus, the discussion in paragraph 149 of the *Second Report* refers several times to a system operating in a community and the question of how to draw a line in the particular community [as to] * * * the appropriate geographical area or areas. Further, a contrary construction would undermine the basic purpose and thrust of the section; it would mean that a system which was supplying distant signals to its subscribers in one small community as of February 15, 1966, could, if it used the same headend, construct new systems in many other separate and distinct communities calling for new franchises (including, such as here, the principal community), without coming within the terms of subsection (a).

We believe that the above construction is the only logical one, and the only one comporting with the obvious intent and purpose of the rule.

Since, however, the matter is before us and a question has been raised, we shall clarify the rule by the addition of the phrase, "* * * in a community * * *" in section 74.1107(a). No such clarification is needed in subsection (b), since that subsection is already couched in terms of "community." We will also clarify the related portions of sections 74.1105 and 74.1107(d) by inserting appropriate references to the "same community" or "another community." [16]

38. The matter of unincorporated areas was considered in the *Mission Cable* case, 4 F.C.C. 2d 236. Mission, which has a franchise to construct and operate CATV systems in the unincorporated areas of San Diego County, urged that by reason of having commenced operations in one part of the county prior to February 15, 1966, it was entitled to the benefits of the "grandfathering" provision of subsection (d) of section 74.1107 for operations throughout the unincorporated areas of the county. While rejecting this broad view (4 F.C.C. 2d at 242), we also declined to rule that the mere existence of several housing developments or subdivisions with different names establishes that each subdivision is a separate and distinct community, within the contemplation of section 74.1107(a) (4 F.C.C. 2d at 240–241). The distinction drawn in *Mission Cable* turned on the presence or absence of substantial tracts of undeveloped land between subdivisions or other populated areas lacking clearly defined legal boundaries (4 F.C.C. 2d at 241, 242).

39. While there may be other situations where an area of proposed new operation is so clearly a separate and distinct community as to bring into play the provisions of section 74.1107(a), we shall not attempt to delineate further the scope of subsection (a) here. The difficulty of drawing lines within an incorporated community and of establishing the separate-community status of adjoining unincorporated areas not separated by undeveloped land was recognized in paragraph 149 of the *Second Report* and in *Mission Cable* (4 F.C.C. 2d at 240), as well as the desirability of avoiding artificial boundaries. In general, except where it would plainly undermine the basic purpose of subsection (a), the drawing of appropriate lines for extension into new geographic areas in the above situations calls for case-by-case judgment and will be considered only upon petition under section 74.1109.

4. MISCELLANEOUS AND PROCEDURE

40. *Annual Filing of Information.*—It is asserted that CATV operators should be required to file on an annual or periodic basis the information described in paragraph 99 of the *Second Report* (2 F.C.C. 2d at 765), for otherwise the information submitted may soon become obsolete and lose its usefulness. While the *Second Report* called for a single submission, we recognize that the regular filing of information by CATV operators may be desirable in this rapidly changing field, so that we or the Congress may take appropriate actions in the public interest. However, we prefer to postpone consideration of this question until we have examined the responses to

[16] In this connection, we also believe it appropriate to delete from sec. 74.1105 the reference to "systems which propose to extend lines into obviously new geographic areas."

our recent questionnaire. After we process the information submitted and gain more experience with the operation of the rules, we will be in a better position to determine whether regular filing is needed and whether any changes or additional information would be appropriate for filing on a regular basis.

41. *Procedural Changes and Clarifications.*—Some of the petitioners have sought clarification or amendment of the procedural provisions of the rules. And, in the course of administering the rules, it has become apparent that other changes would be desirable. Because the amendments adopted at this time relate to procedural matters and are designed to clarify the rules, notice and further rulemaking are not required. The changes and clarifications are indicated below.

42. First, in administering the rules we have discovered that in many instances additional copies of pleadings filed were needed for Commission processing. Also, in those instances where procedures were not specifically provided for in part 74 of the rules, there has been some confusion as to the filing of pleadings and reply pleadings. In order to obviate these difficulties, we are amending section 74.11 of the rules so as to add a cross reference to subpart A of part 1 of the rules, "General Rules of Practice and Procedure."

43. Second, there appears to be a fairly widespread misconception that notice under section 74.1105 need not be given with respect to proposed service coming within the provisions of section 74.1107. This misconception may arise from the fact that section 74.1107(b) does not require service of a request for evidentiary hearing but provides instead for public notice by the Commission. The notice requirement in section 74.1105 applies to all proposed service, whether or not section 74.1107 is involved. In order to clarify this matter, section 74.1107(b) will be amended to require a statement that copies of the notices given pursuant to section 74.1105 have been filed with the Commission.

44. Entron, Inc., has requested that section 74.1105 be revised to provide that a CATV system need not delay the commencement of new service, upon the filing of a timely petition under section 74.1109, unless it is ordered to do so by special order of the Commission. Entron claims that the last portion of section 74.1105 is presently inconsistent with section 74.1109(f), which it construes to mean that a ruling by the Commission on the "interlocutory question of temporary relief" is prerequisite to any stay of proposed operations. There is no conflict between the two sections. As in the case of new distant signals in major markets, the Commission's notification and ad hoc procedures contemplate that where a section 74.1109 petition concerning new service (not within the provisions of sec. 74.1107(a)) is filed within 30 days after notice, the proposed service shall not commence until after the Commission has either considered the matter on the merits or has specifically ruled on the question of temporary relief pending further procedures. We believe this to be a more orderly manner in which to proceed, rather than permitting a challenged service to start and later interrupting it. See *Second Report*, paragraph 140; memorandum opinion and order of May 27, 1966, in this proceeding, F.C.C. 66–456, 3 F.C.C. 2d 816, 820. Of course, service not challenged in the

petition may be commenced. And section 74.1109(f) not only provides for expedited consideration of new-service questions but would also permit the temporary relief of allowing some or all of the challenged service to commence pending further procedures where this is warranted in the public interest in the particular circumstances. We are not persuaded that this procedure should be altered.

CONCLUSION

Authority for the rule amendments adopted herein is contained in sections 1, 2(a), 3(a), 4 (i) and (j), 303, 307(b), 308, and 309 of the Communications Act of 1934, as amended.

Accordingly, *It is ordered*, This 5th. day of January 1967, that parts 21, 74, and 91 of the Commission's rules and regulations *Are amended* as set forth in the attached appendix B, effective February 28, 1967.

It is further ordered, That the petitions for reconsideration filed by the parties listed in the attached appendix A *Are denied*, except to the extent reflected herein.

It is further ordered, That the petitions for rulemaking, filed by WBEN, Inc., on July 12, 1966 (RM 1017), and by Jackson TV Cable Co. on August 15, 1966 (RM 1025), *Are denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX A

Petitions for reconsideration were filed by the following persons:

Akron Telerama, Inc.
Alice Cable Television Corp.
Alpine Cable Television, Inc.
Al-Pines Cable TV, Inc.
Amsterdam TV Cable Co.
Association of Maximum Services Telecasters
Black Canon Broadcasting Co., Inc.
Buckeye Cablevision, Inc.
Cabletron, Inc.
Cablevision Co. of Anniston
Central California Communications Corp.
Chattahoochee Valley CATV, Inc.
Columbus Broadcasting Co., Inc.
Courier Cable Co., Inc.
Cosmos Broadcasting Corp.
Cosmos Cablevision Corp.
Cox Broadcasting Corp.
Cox Cablevision Corp.
Delhi Video, Inc.
Entron, Inc.
Florida TV Cable, Inc.
Frontier Broadcasting Co.
Gloversville TV Cable Co., Inc.
Greater Lafayette TV Cable Co., Inc.
Jerrold Corp.
Jerrold Electronics Corp.
Johnstown TV Cable Co., Inc.
Logansport TV Cable Co., Inc.
McAllen Cable Television Corp.
Malibu Cable TV Inc.
Mesa Verde Broadcasting Co., Inc.
Mission Cable TV, Inc.
Mohican TV Cable Corp.
National Association of Broadcasters
New Channels Corp.
Newhouse Broadcasting Corp.
Old Pueblo Broadcasting Co.
Ottawa TV Cable Co., Inc.
Pacific Video Cable Co.
Perfect TV, Inc.
Pontiac TV Cable Co., Inc.
Rollins, Inc.
Savannah TV Cable, Inc.
Southwestern Cable Co. (statement of position)
Streator TV Cable Co., Inc.
Taft Broadcasting Co.
Telerama, Inc. (statement in support of petitions for reconsideration and opposition to petition for reconsideration of AMST)
TeleSystems Corp.
Television Communications Corp.
Trans-Video Corp.
Western Slope Broadcasting Co., Inc.
Wichtex Radio & Television Co., Inc.
WTVY, Inc.

APPENDIX B

I. Part 21 is amended as follows:

1. In § 21.712, paragraphs (c) and (d)(3) are amended, and paragraph (d)(4) is added, as follows:

§ 21.712 AUTHORIZATIONS FOR FIXED STATIONS TO RELAY TELEVISION SIGNALS TO CATV SYSTEMS.

* * * * * * *

(c) *Stations required to be carried.*—Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 w or higher power.

(d) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (g) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the grade B or higher priority contours of both a satellite station and its parent station, the system need carry only the station with the higher priority; if the satellite station and its parent station are of equal priority, the system may select between them.

* * * * * * *

II. Part 74 is amended as follows:

1. § 74.11 is amended by the addition of a new final phrase and as amended reads as follows:

§ 74.11 CROSS REFERENCE.

See subpart D of part 1 of this chapter for general requirements as to applications, filing of applications, and description of forms; see § 1.1111 of subpart G of that part for the fees to be paid in connection with applications for facilities in the services covered in this part; and with respect to subpart K of this part, except where specific provision is made regarding practice and procedure, the provisions of subpart A of part 1 are applicable.

2. In § 74.1033, paragraphs (a) and (b)(3) are amended, and paragraph (b)(4) is added, as follows:

§ 74.1033 LICENSING REQUIREMENTS.

* * * * * * *

(a) *Stations required to be carried.*—Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or

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higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 w or higher power.

(b) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority; if the satellite station and its parent station are of equal priority, the system may select between them.

* * * * * * * *

3. A new § 74.1100 is added to subpart K to read as follows:

§ 74.1100 Cross Reference.

See § 74.11.

4. In § 74.1103, paragraphs (a) and (b)(3) are amended, and paragraph (b)(4) is added, as follows:

§ 74.1103 Requirements Relating to Distribution of Television Signals by Community Antenna Television Systems.

* * * * * * * *

(a) *Stations required to be carried.*—Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system, in whole or in part, with 100 w or higher power.

(b) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the grade B or higher priority contours of both a satellite station and its parent station, the system need carry only the station with the higher priority; if the satellite station and its parent station are of equal priority, the system may select between them.

* * * * * * *

5. § 74.1105 is revised to read as follows:

§ 74.1105 NOTIFICATION PRIOR TO COMMENCEMENT OF NEW SERVICE.

(a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted grade B contour the system operates or will operate, and to the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any.

(b) The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence.

(c) Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided, however,* That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107.

(d) The provisions of this section do not apply to any signals which were being supplied to subscribers in the community of the CATV system on March 17, 1966, unless it is proposed to extend lines into another community.

6. In § 74.1107, paragraphs (a), (b), and (d) are amended, as follows:

§ 74.1107 REQUIREMENT FOR SHOWING IN EVIDENTIARY HEARING AND COMMISSION APPROVAL IN TOP 100 TELEVISION MARKETS; OTHER PROCEDURES.

(a) No CATV system operating in a community within the predicted grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend

a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their grade B contours, the date on which copies of the notifications required by § 74.1105 of this chapter were filed with the Commission, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such response or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

* * * * * * *

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers in a community on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; *Provided, however,* That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area or any extension into another community does come within the provisions of paragraphs (a) and (b) of this section; *And provided further,* That no CATV system located in a community in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its grade B contour, shall extend such service to new geographical areas within the same community where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the *Second Report and Order* in dockets Nos. 14895, 15233, and 15971, FCC 66–220, paragraphs 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas in the community. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

III. Part 91 is amended as follows:

1. In § 91.559, paragraphs (a) and (b) (3) are amended and paragraph (b) (4) is added, as follows:

§ 91.559 Authorizations for Operational Fixed Stations To Relay Television Signals to CATV Systems.

* * * * * * *

(a) *Stations required to be carried.*—Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 w or higher power.

(b) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the grade B or higher priority contours of both a satellite station and its parent station, the system need carry only the station with the higher priority; if the satellite station and its parent station are of equal priority, the system may select between them.

* * * * * * *

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I vote to grant reconsideration and set aside the CATV rules adopted by the *Second Report and Order.*

In my opinion, the Communications Act does not give the Commission jurisdiction over CATV systems, and, accordingly, we are without authority to promulgate the rules.

It is also my opinion that recent copyright developments cast CATV considerations in a different context from that obtaining when the present rules were adopted. Those developments are the New York court's decision in *United Artists Television, Inc.* v. *Fortnightly Corp.* (255 F. Supp. 177, S.D.N.Y.) and H.R. 4347, 89th Congress, 2d session, to amend the copyright law. Both looked to imposing copyright liability on CATVs. They portend a significantly changed status for CATV.

The Commission majority's denial of reconsideration of the CATV rules is, at best, an effort to maintain the status quo until a more realistic policy is crystallized in the context of current developments. I believe that the status quo is so unrealistic, even in the context of present circumstances, that it should be discarded.

The heart of concern over CATV has been its possible evolution into pay television. Fear has been expressed that community antenna systems will be built and made viable by use of free programing from broadcast stations; and then, after the systems have so acquired a sufficient number of subscribers, they could afford to originate their own programs, and pay television would result. However, if CATV is made liable for copyright fees on programs, the argument of unfair competitive advantage in favor of CATV would be removed, and I believe that there would be no need to preclude program origination or, for that matter, to impose any artificial barriers protective to broadcasting or any other impediments to development of CATV in the marketplace.

Dissenting Opinion of Commissioner Lee Loevinger

(On Reconsideration of CATV Rules, Dockets Nos. 14895, 15233, and 15971)

The Commission is now issuing an opinion and order in a group of related CATV rulemaking proceedings, the effect of which is to refuse to reconsider or change (except in some minor details) the CATV rules announced on February 15, 1966, and issued on March 8, 1966. In view of the probability of congressional consideration and action in the present session of Congress, this result is not unreasonable, and I would be inclined to concur were it not for the accompanying opinion. The opinion which the Commission is issuing is a typical institutional product which has had very slight Commission-level consideration or analysis. It is composed mainly of institutional cliches, but the implications of the reasoning now given Commission approval are sufficiently drastic and extensive to warrant more detailed analysis. My main objections are three:

First, the opinion asserts Commission jurisdiction which is self-bestowed and unlimited;

Second, the opinion fails to come to grips with either the issues or the facts and rests on semantic confusion and superstition;

Third, contrary to the express representations made by the Commission in this matter, the effect of the rules as now construed is to impose a freeze or prohibition on technological development and economic expansion in this field.

The position now taken by the Commission on jurisdiction is a prime example of lifting oneself by one's own intellectual bootstraps. Reduced to its barest elements this intellectual bootstrapping operation consists of asserting jurisdiction without statutory authority or precedent, refusing to hear argument regarding the position on the ground that the decision has already been made, and then proceeding to act on the jurisdiction asserted, pointing to one's own assertion and prior decisions as precedent and justification. If this characterization seems exaggerated, attention is invited to the actual course of events.

Federal regulation of radio transmission was instituted because "the radio spectrum simply is not large enough to accommodate everybody," radio transmitting stations were operating in such numbers and manner that there was chaos in the spectrum, and regulation of radio transmission was therefore "as vital to its development as traffic control was to the development of the automobile." *NBC* v. *U.S.*, 319 U.S. 190, 210–214 (1943). The Communications Act was passed in 1934 when television was still wholly experimental and CATV was unheard of. The basic function of the Commission and its basic authority, so far as relevant to this subject, was to license radio transmitting stations (47 U.S.C., sec. 151).

During the 1950's CATV and other ancillary television transmitting techniques developed and a demand was made that the Commission assert jurisdiction over them and regulate them. In 1958 the Commission instituted an overall "Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV 'Satellite' Stations, and TV

'Repeaters' on the Orderly Development of Television Broadcasting," docket No. 12443. After a year of inquiry, the Commission issued an extensive report and order, finding, without dissent, that it was without jurisdiction over CATVs. *CATV and TV Repeater Services*, 26 FCC 403 (1959).

A few years later the Commission held that it was authorized to deny a license to transmit television signals by microwave radio transmission to a small community with one television station, on the ground that evidence of record showed that the economic impact of the applicant's operation would drive the television station out of business. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), affd. 321 F. 2d 359 (C.A.D.C. 1963), cert. den. 375 U.S. 951 (1963). In *Carter Mountain* the Commission did not consider its own prior decision and its only comment on that precedent was: "To the extent that this decision departs from our views in * * * 26 FCC 403 * * * those views are modified."

The next step in the expansion of jurisdiction was the issuance of a "Notice of Inquiry" on April 23, 1965 (FCC 65–334). This was ostensibly an inquiry into whether the Commission had authority to promulgate rules regulating CATVs and particularly nonmicrowave CATVs (i.e., those transmitting signals wholly by wire and not employing radio transmission). However, attached to the "Notice of Inquiry" was a memorandum from the Commission general counsel asserting that the Commission did have plenary authority over CATVs "whether microwave is used or not." On the basis of this memorandum, without further discussion or inquiry, the "Notice of Inquiry" asserted the conclusion that "CATV systems are engaged in interstate communications by wire" and are, therefore, subject to the Commission's regulatory authority (FCC 65–334, par. 29). Neither the Commission's notice nor the memorandum on jurisdiction so much as mentioned the prior Commission determination that it lacked jurisdiction, and the memorandum relied wholly on general language in the Communications Act unrelated to either a specific grant of jurisdiction or the kind of action proposed by the Commission. See opinion of Commissioner Loevinger, 38 FCC 746. To no one's surprise, the Commission concluded this inquiry by reaching the decision that it did have jurisdiction to regulate cable CATV (i.e., systems not using any radio transmission) as well as microwave CATV. *Second Report and Order*, 2 FCC 2d 725 (1966).

A few months later in implementing its CATV rules the Commission issued a cease and desist order, the effect of which was to put a small town cable CATV out of business. *Back Mountain Telecable, Inc.*, 5 FCC 2d 735 (1966). A demand was made for oral argument before the Commission on constitutional questions involved in this assertion of Commission jurisdiction. The Commission summarily denied this request on the ground that the views expressed in the *Second Report and Order*, supra, "dispose of the questions raised," and, hence, "no purpose would be served by oral argument," despite the fact that a dissenting opinion pointed out that not only did the opinion cited not "dispose of" the constitutional issues, but it did not even consider or mention them.

In the present opinion the Commission considers the constitutional free speech issue for the first time, with the statement that it will treat this question "in greater detail"—presumably meaning "greater detail" than the complete absence of discussion in prior opinions. However, the present discussion is confined to citing *NBC* v. *U.S.*, 319 U.S. 190 (1943), and *Lafayette Radio* v. *U.S.*, 345 F. 2d 278 (C.A. 2d 1965), for the proposition that "reasonable regulation of radio transmissions, if consistent with the public interest * * * is not violative of the right of free speech," and then concluding that:

> * * * there is no reason why the free speech principles should apply differently to those CATVs which derive their signals off-the-air than to those which use licensed radio.

The *Lafayette Radio* case sustained Commission regulation of Citizens Band radio on the grounds that the *NBC* case held licensing required by the limited facilities of radio. In the *NBC* case, the Supreme Court met the specific argument of constitutional free speech in these words:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. *NBC* v. *U.S.*, 319 U.S. 190, 226 (1943).

It should be self-evident from the Supreme Court statement that, contrary to the position of the instant opinion, there is every reason "why free speech principles should apply differently" to those CATVs which do not use radio transmission and to those which do. The whole reason and rationale for Government regulation in this field is the physical necessity for establishing and maintaining technical standards and order so that radio transmission is possible. Further, the rationale of the *NBC* case is based squarely and solely on the necessity of denying access to radio transmission to some because of the limited space in the spectrum. It makes no legal, technical, or logical sense to say that a case holding regulation to be justified because of the "limited facilities of radio" transmission, also justifies the same regulation of cable transmissions.

Furthermore, even the Commission opinions, when they have addressed themselves to the issue of jurisdiction, have based the conclusion of jurisdiction on the assertion that cable CATV is "engaged in interstate communication by wire" (FCC 65–334, par. 29)—on the theory that the signals carried have crossed a State line before being picked up by the CATV and transmitted by wire. But in the *Back Mountain* case a Pennsylvania CATV system was picking up Pennsylvania television stations and transmitting their signals by wire to its customers in Pennsylvania. (Some New York signals were also carried, but this activity was clearly separable for legal purposes.) The Commission has not yet seriously discussed or considered the legal basis of jurisdiction to order cessation of operation by a CATV system which picks up signals from a station within the State of its situs and transmits these by cable to customers in the same State. (The problem is brushed off by casual reference, without discussion, in a footnote in

the *Second Report*, 2 FCC 2d 732, footnote 9.) However, it has entered cease and desist orders against such activities and has been willing to order some such systems out of business. See, e.g., *Back Mountain Telecable, Inc.*, 5 FCC 2d 735 (1966).

Thus, the Commission has bootstrapped itself into an assertion of jurisdiction over all CATVs without ever squarely defining, analyzing, and considering the issues, the legal basis of its jurisdiction, and the limitations of the jurisdiction asserted. By this intellectual bootstrapping operation the Commission has moved from a specific statutory authority to license interstate radio transmissions to the assertion of a self-bestowed power to regulate and prohibit the intrastate transmission by wire of programs originating, broadcast, and received within the same State. As authority the Commission relies on a Supreme Court opinion upholding regulation of interstate radio transmission by licensing because of its unique characteristic and blandly asserts that there is no reason why the same principles should not apply to communication that is not by radio and that has entirely different characteristics. As the jurisdictional issue has not yet been clearly defined, considered, or determined, it is by no means clear that there is a majority of the Commission in support of the jurisdiction that is in fact being exercised, but so potent and impersonal is the bureaucratic institutional process that actions taken without definition or consideration of issues or principles become precedents which provide their own rationalization and finally preclude the Commission from ever defining, considering, and thoughtfully determining their legal validity and implications.

The assertion of jurisdiction on such a basis as this should be a matter of concern, but the underlying process and rationale and the implications for the future are even more important. The closest the Commission has come to specifying a basis for the jurisdiction it is now exercising is in the *Second Report and Order*, 2 FCC 2d 725 (1966). It there discusses jurisdiction as a matter of law (pars. 8–19), and assertion of jurisdiction (pars. 20–46). The arguments under the first category boil down to the assertions that CATV systems "are themselves engaged in 'interstate communication by wire,'" and that there is no "bar to jurisdiction" (pars. 12, 19). Although the basis for asserting that CATVs are engaged in interstate communication by wire is not spelled out, it appears to rest on the fact that some CATVs receive radio broadcasts originating outside the State of situs and then transmit the programs thus received over wires within the State of situs. The jurisdictional discussion under the second category is devoted entirely to the effort to show that regulation of both microwave and cable CATV is subject to Commission regulation because "this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service * * *" (par. 21, et seq.).

If such reasons are adequate to support jurisdiction, then there is no limit to the authority of this Commission. It is apparent at a glance that these reasons apply with even greater force to the great national television networks than to the CATVs. Yet the Commission

has so far given no indication of the fact that it has often disclaimed jurisdiction to regulate networks, and has asked Congress for such authority, which has so far been withheld. If the present position of the Commission is sustained, the Commission has plenary power to control networks by direct regulation without any other or further legislative action. This conclusion is hinted, though not expressly claimed, in a footnote in the *Second Report*, 2 FCC 2d 732, footnote 9. Before this conclusion is accepted complacently, it should be noted that the asserted jurisdiction is now being exercised in the CATV field to require the carriage of some programs and to prohibit the carriage of others.

The implications of the jurisdiction now being asserted go much further. The reception of a program originating outside the State and its transmission to customers by wire is said to constitute interstate communication subject to regulation. If a program is put on tape or film and thus transported across a State line, then transmitted by wire to customers within a single State, all of the grounds urged for jurisdiction apply equally, and there is no logical basis for differentiating this mode of communication from that now subject to the asserted jurisdiction. If this is so, it seems immaterial to the considerations most relied on by the Commission whether the recorded program is exhibited by transmission intrastate to a number of houses or exhibited to the public in one or a few theaters. So, by this reasoning, the Commission has jurisdiction over motion picture theaters—to be exercised as the Commission in its wisdom decides that the economic consequences of motion picture exhibition require in the public interest.

By similar reasoning it can easily be demonstrated that most news and feature material in newspapers come to the publisher through interstate communication by radio or wire. (Very few modern newspapers still rely on the pony express.) But since the Commission in effect holds that the precise mode of presenting the interstate communication to the public is immaterial, the fact that pictures and words are printed on paper and then distributed after being transmitted interstate will not be controlling. The Commission can cite the *NBC* case for the proposition that the first amendment does not prevent reasonable regulation in the public interest. Next the Commission will assert that "there is no reason why the free speech principles should apply differently" to newspapers than to radio merely because the situation involving the technical mode of communication is different—and the instant opinion stands for just this proposition. Thus, by its present course of reasoning, the Commission has jurisdiction to regulate newspapers—in the public interest, of course.

With far less ingenuity and disregard of logic than has been demonstrated by the Commission's opinions thus far, the asserted jurisdiction can be extended almost literally without limit. If it be objected that this reasoning is strained and untenable—which it is—then it must be answered that, assuming validity of the Commission's present assertion of jurisdiction, the extensions suggested rest on more cogent and coherent reasoning than that by which the Commission reached its present position.

The Commission, of course, disavows any present intention of claiming jurisdiction over newspapers, theaters, and other media of communications or other enterprises. But only a few years ago, the Commission was just as positively disavowing the jurisdiction which it now asserts. It would take only a change of personnel or of viewpoint—both of which are inevitable in time—for the Commission to assert the application of its self-bestowed jurisdiction to all modes of communication and entertainment.

I do not believe that Congress ever intended to grant or will in the future ever act to grant such a vague and limitless jurisdiction as the Commission now asserts and exercises. Even this cursory analysis should suffice to demonstrate that there is a strong practical, as well as legal, reason for insisting that the broad power of regulation should be confined within the jurisdiction specified by Congress in statutes, rather than left to be exercised at large by the hypothetical discretion of the institutional decision-making process.

My second objection to the opinion is that it so clearly illustrates the most common inadequacy of the institutional decision-making process. The opinion, like those that preceded it, simply fails to come to grips with either the issues or the facts and rests almost entirely on semantic confusion and superstition. The opinion summarizes the provisions of the rules and the positions taken by the several petitions for reconsideration. Beyond this, the opinion relies principally on the assertion that the results reached will serve the public interest. The public interest is referred to more than 20 times, and serves as the main rationalization for the results reached regarding jurisdiction (pars. 4, 5, 8), regarding satellites (par. 10), regarding the use of grade B contours (pars. 13, 32, 33, 34), regarding nonduplication (par. 18), regarding the CATV freeze in major markets (pars. 23, 25), and regarding the use of grade A contours (par. 30). The freeze in small markets, considered in more detail below, is rationalized by invocation of the term "orderly" (par. 44).

It should take no great sophistication to understand that basing a decision on the bald assertion that it is required or implied by some high-order abstraction, such as "the public interest," "orderly procedure," or "the most desirable course," without specifying some concrete referents relevant to the case, is simply semantic superstition, equivalent to basing a decision on necromancy, astrology, numerology, or tea leaf reading. It provides neither an explanation of past actions nor a guide to future actions, and means no more than that the decisionmaker has reached a result but cannot or will not say why.

What constitutes a "private interest" in a given situation is often relatively clear—the monetary profit of an individual or corporation—although this term is not often used except as an ignoble contrast to the more honorific "public interest." But the public and private interests are by no means antithetical. On the contrary, it is the theory of our system that most often the public interest will consist of allowing people to pursue their own private interests in their own way. In any event, the "public interest" is not a single specific criterion, a definite operational standard, or a term of self-evident

meaning. The most extensive and scholarly attempt to analyze the concept of "public interest" comes to the conclusion that

> * * * our investigation has failed to reveal a statement of public-interest theory that offers much promise either as a guide to public officials who are supposed to make decisions in the public interest, or to research scholars who might wish to investigate the extent to which governmental decisions are empirically made in the public interest. For either of the latter purposes, it would be necessary to have operational definitions of the public-interest concept; and neither my analysis nor that of other contemporary critics suggests that the public-interest theory prevalent in America today either is or is capable of being made operational * * *. It may be somewhat difficult for some readers to accept the conclusion that there is no public-interest theory worthy of the name and that the concept itself is significant primarily as a datum of politics. As such, it may at times fulfill a "hair shirt" function, to borrow Sorauf's felicitous phrase; it may also be nothing more than a label attached indiscriminately to a miscellany of particular compromises of the moment. Glendon Schubert, "The Public Interest," 220, 223 (1960).

An analysis of the public-interest concept in the light of Supreme Court decisions and in the context of Government regulatory power reaches essentially the same conclusion. Loevinger, "Regulation and Competition as Alternatives," 11 Antitrust Bulletin 101, 129 et seq. (1966). In upholding the concept as a criterion of action for the Commission, the Supreme Court was at pains to point out that it was "not to be interpreted as setting up a standard so indefinite as to confer unlimited power," but was to be interpreted by its statutory context, the nature of radio transmission and reception, and other factors. *NBC* v. *U.S.*, 319 U.S. 190, 216 et seq. (1943). However, just as the Commission opinion has taken the Court's conclusion regarding the first amendment and applied it to precisely the kind of situation which the Court's opinion precludes by specific statement, so has it also taken the public-interest criterion and converted it into a "standard so indefinite as to confer unlimited power." At no point in the instant opinion or any other opinion is there any indication of the necessity of specifying what the Commission conceives the public interest to mean in concrete terms in a particular situation. It uses the phrase "public interest" as "nothing more than a label attached indiscriminately to a miscellany of particular compromises of the moment."

The instant opinion leaves the reader without a clue as to whether the phrase "public interest" as used in support of the decision has any meaning at all. Could it mean conservation of usable space in the spectrum? Clearly not—for the activities which are forbidden and limited by the rules tend to conserve spectrum, and the activities which are protected and encouraged use large amounts of spectrum. Could it mean minimizing or avoiding electronic interference? Clearly not—for the activities which are forbidden and limited cause no interference, as they use no spectrum. Could it mean providing or encouraging more diverse programs? Clearly not—for the best hope of television program diversity in many communities is probably through CATV, but the rules will favor a single television station over the diversity of a multichannel system if there is any economic conflict or rivalry between them. Does the public interest mean giving the public

what it wants or demands? Clearly not—for most of the rules and all of the cease and desist orders in this field are aimed at forbidding a service which a large segment of the local public is demanding and willing to pay for. Does the public interest mean to encourage experimentation and the development of new technology? Clearly not—for the principal purpose of the rules and the Commission actions under them is to limit and restrain the development of CATV as a new technology.

The only specific meaning that can be attributed to the phrase "public interest" as it is used in the Commission opinion is that it means protecting the private interest of broadcasters by limiting or suppressing any actual or potential competition by CATV.

Perhaps this objective can be justified in whole or in part. But it certainly has less sentimental appeal when plainly stated than when couched in the vague euphemism of "public interest," and also requires a good deal more by way of factual support, close examination, and logical analysis than the Commission has yet given the subject. Invocation of the pious phrase "public interest" may stir the emotions but it adds nothing to the intellectual argument and is merely a way of avoiding thought and cutting off debate. It does not have even the rationality of an appeal to divine guidance which was implicit in trial by compurgation, ordeal, and battle. To rest a conclusion on the justification that it "serves the public interest," without specifying concrete referents, is simply semantic superstition in contemporary terminology.

Finally, I object to the Commission's refusal to examine and consider the fact that the rules as now construed and in practical operation have imposed a freeze or prohibition on the development and extension of CATV service.

The CATV rules have been the subject of bitter controversy both in the industry and on the Commission since they were first proposed. In February 1966 the Commission met and the Commissioners agreed on a plan for the regulation of CATV systems which was set forth in a public notice dated February 15, 1966. This notice was not simply a press release but was the actual draft of the agreement among the Commissioners, and the text was carefully examined by the Commissioners as a precise statement of what the Commission had, in fact, agreed upon. This is made plain by the three statements accompanying the Commission notice, which state the personal concurrences and dissents on particular points of the Commissioners making the statements.

One of the principal purposes of the Commissioners in promulgating the February 15 compromise plan was to avoid a freeze on all CATV development and expansion, which had been previously urged upon them. This was done by providing in substance that in the top 100 television markets no CATV operation could be commenced or expanded without specific Commission approval, after a full evidentiary hearing and a finding that the potential effects of the proposed CATV operation would not be substantially competitive with any existing or proposed television stations, and that such an impediment would not be imposed outside the top 100 markets. On the latter point, the

specific language of the notice, which embodied the Commission action, was:

> The Commission's prior approval after an evidentiary hearing will not be required by rule for proposed CATV systems or operations in markets below 100 in the ARB rankings. However, the Commission will entertain, on an ad hoc basis, petitions from interested parties concerning the carriage of distant signals by CATV systems located in such smaller markets.

Three weeks later, on March 8, 1966, the Commission issued its institutional opinion and the text of the rules which were to effectuate the plan adopted February 15. The opinion and rules were more than 80 printed pages of small type (2 FCC 2d 725–808). The Commission issued another public notice announcing the adoption of these rules "to effectuate its plan for regulation of all CATV systems, as announced on February 15, 1966 * * *." The March 8 notice again summarized the provisions of the plan and the rules, and stated, in substantially the same language as on February 15, that (with exceptions immaterial here) no CATV operation could be commenced or expanded in the top 100 markets except with Commission approval after a full evidentiary hearing, and that no prior Commission approval or hearing would be required in smaller markets.

Since these rules were promulgated the institutional construction and application has converted the small-market rule into the equivalent of the rule applicable to the top 100 markets. That has occurred in this manner. The Commission plan, and the rules, provided that CATVs could commence or expand operation in the smaller markets without Commission approval but that any interested person could file an ad hoc petition in any situation and that the Commission could impose additional or different requirements than the rules (47 CFR, sec. 74.1109; 2 FCC 2d 725, 805). This has now been construed to mean that where a petition is filed to impose additional requirements upon, or prevent the operation of, a CATV system in a market smaller than the top 100, the CATV cannot commence or expand operations until it has a specific order of approval from the Commission. In plain language, the mere filing of a petition under section 74.1109 operates to impose an absolute and indefinite injunction against commencement or expansion of any operation by any CATV. Thus, any place and any time that there is any licensee, permittee, applicant, potential applicant, competitor, or other interested person who desires to stop the operation of a CATV system, he is given full power to do so by the present Commission rules. The mere filing of a petition, regardless of its form or merit and without any review or examination by the Commission, suffices to impose a complete prohibition against operation of the CATV system involved.

Thus, the compromise plan of February 15, which was adopted to avoid a freeze of CATV development, turns out to be a compromise in form and words only. No operation can be commenced or expanded in the top 100 markets until after the lengthy and arduous process of an FCC evidentiary hearing has been completed—which inevitably requires several years at least. No operation can be commenced or expanded in any other market if anyone objects. In the top 100

markets the freeze or prohibition operates automatically and regardless of objection. In all other markets the freeze or prohibition must be invoked by some objection. But in practice there is no lack of objectors. So the Commission has—albeit unintentionally and unknowingly—in practical effect imposed a freeze on CATV development or expansion in all markets, with only a slight procedural differentiation between the top 100 markets and the smaller markets, despite its express disclaimers of such action in the public notices of February 15 and March 8. This result the Commission now recognizes and affirms on the grounds that it is "more orderly" (par. 44). Needless to say, this verbalism is no more meaningful than the more favored "public interest."

While I agree with Commissioner Bartley that the status quo in this area is so unrealistic that it should be discarded, I might be inclined to concur in an opinion and order that did no more than maintain the present rules on the ground that congressional action may be expected to provide guidance to the Commission in the near future. However, the present opinion has the form of a discussion of the merits, but without factual or logical substance. The history of the development of the Commission position on this subject, first as to jurisdiction and, more recently, as to the imposition of a general freeze, is such that no one can surmise, much less predict, from the semantic confusion and opacity of the instant opinion, what the Commission may do in the future.

Perhaps the Commission should not attempt to regulate CATVs at all. Perhaps the Commission should prohibit CATVs altogether. Perhaps the Commission should attempt to write some clear and consistent rules to insure that CATVs will provide the public with better and more diverse program service than the public would get in the absence of CATV. Perhaps a revision of the copyright law or of section 325 of the Communications Act to give proprietary rights to program originators is the best approach to this field. The only thing that is quite clear to me is that there is no hope of finding a rational and practical course until the Commission climbs out of the intellectual morass and dispels the semantic fog in which this subject is now lost.

SEPARATE STATEMENT OF COMMISSIONER KENNETH A. COX

I concur in this disposition of the petitions for reconsideration. For the reasons set forth in my separate statement issued in connection with the *Second Report and Order* in dockets Nos. 14895 et al., 2 F.C.C. 2d 725, 868 (1966)—which are reinforced by the petitions and associated pleadings filed since—I still believe that there are persuasive reasons why the Commission should have provided more than same-day nonduplication protection and should have treated markets below the top 100 in the same way as it did the largest markets in connection with the importation of distant signals, and would, therefore, have preferred modification of the rules as to these matters. However, there being no disposition on the part of most of my colleagues to strengthen the rules, and the matter being before us on

reconsideration, I think it appropriate to approve the action here taken so as to keep at least the rules we now have.

There are a number of additional changes I would have liked to make. I believe we should have deleted footnote 40 and made the predicted grade B contour controlling as to questions of carriage. I am also impressed by the showing made with respect to the problem of protection against prior duplication of network programs on Canadian stations whose signals are carried on cable systems in this country. I think it would have been desirable to handle this by rule. However, I recognize that there might be a problem of notice, and join in the conclusion that this will have to be dealt with on the basis of individual requests for nonduplication protection in addition to that provided by the rules.

Under all the circumstances, this memorandum opinion and order represents the best results obtainable at this time. Although I think more effective regulation is needed, I concur in this action.

I should like also to comment briefly on Commissioner Loevinger's dissent. As I understand that dissent, it asserts three main points: (1) That we have asserted "self-bestowed and unlimited" jurisdiction; (2) that our opinion fails to set out the public-interest considerations involved; and (3) that we have imposed a freeze on CATV expansion in all television markets. I believe all three points are mistaken.

First, we have not asserted unlimited jurisdiction. Rather, the assertion of authority rests squarely upon the explicit provisions of the Communications Act. The act says that its provisions "shall apply to all interstate * * * communication by wire or radio * * * and to all persons engaged within the United States in such communication * * *" (sec. 2(a)). A CATV system involves an "interstate communication by wire" within the definition set out in sections 3 (a) and (e). Indeed, while Commissioner Loevinger appears to question this in some circumstances (by ignoring cases such as *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6, 1962), cert. den. 371 U.S. 820),[1] the CATV industry itself has conceded that it is in interstate commerce. See brief of the National Community Television Association before the Connecticut Public Utilities Commission, docket No. 10250 (1964), page 9; exhibit B, page 20. The provisions of the act are therefore applicable to CATV operations. The provisions which are being applied in our finding and assertion of jurisdiction are section 307(b), calling for local services equitably distributed among the States and communities; section 303(h), giving the Commission the authority to establish the service areas of stations (in order to achieve a system of local outlets), and section 303(s), the all-channel law establishing a policy of promotion of UHF outlets, particularly in the major or medium-sized markets, to provide a competitive, nationwide television service. If one were to draw a diagram of the basis for our jurisdiction to deal, for example, with importa-

[1] Commissioner Loevinger also ignores the fact that network programing, which appears on all CATV systems, clearly involves interstate transmission by both wire and radio, so that a CATV system is a link in the chain of interstate commerce when it carries such programing.

tion of distant signals into the major markets, it would, I think, look something like this:

The Commission may make rules to prescribe the conditions	Sections 4(i), 303(r)
under which a TV signal may be extended,	Section 303(h)
via the medium of CATV,	Sections 2 (a), 3 (a), (e)
in order to prevent frustration of the congressional scheme of television regulation.	Sections 307(b), 303(s)

The above is a perfectly straightforward assertion of jurisdiction. It is not "self-bestowed" or "unlimited." As to the constitutional free speech argument raised, the short answer is that CATV systems constitute a part of the scheme of television distribution (*Clarksburg Publishing Co.* v. *FCC*, 225 F. 2d 511, 517 (C.A.D.C., 1955)). Unlike any other purely nonbroadcast mode of expression, they make use of radio signals as a sine qua non of their operation. Therefore, their reasonable regulation to prevent frustration of the congressional scheme for our broadcast service does not violate the first amendment.[2] *NBC* v. *U.S.*, 319 U.S. 190, 227; *Carter Mountain Transmission Corp.* v. *F.C.C.*, 321 F. 2d 359 (C.A.D.C., 1963), cert den. 375 U.S. 951; *Lafayette Radio Electronics Corp.* v. *United States*, 345 F. 2d 278 (C.A. 2, 1965). And the fact that we have undertaken their regulation—as interstate communications by wire which extend the service areas of the TV stations they carry and which come explicitly within the act—does not mean that the Commission could regulate newspapers or bowling alleys or other such enterprises merely because they have an impact on broadcasting, and the Commission has so stated. *Second Report and Order*, 2 FCC 2d 725, at 729–730, paragraphs 11–12.

Commissioner Loevinger's most astonishing argument, however, is his assertion that the Commission has not set forth what the public interest is in the context of the present matter. First, I must point out that the matter is before us on reconsideration, and we, therefore, stated at the outset (par. 1 of our memorandum opinion and order) that we would not deal again with matters fully covered in our prior decision. Surely, that is established and proper procedure.

Second, our prior decision set forth at length what we believe to be the public-interest considerations in this field. We there pointed out three reasons why the public interest would not be served if CATV systems were to replace TV stations, particularly potential new UHF stations:

> (1) CATV systems have not served as outlets for local expression; additional service via cable means service brought in from other communities and not geared to serving the needs and interests of the local public. Com-

[2] Commissioner Loevinger baldly states (p. 2): "Neither the Commission's notice nor the memorandum on jurisdiction so much as mentioned the prior Commission determination that it lacked jurisdiction * * *." But the notice did deal with this issue, stating (par. 28, 1 FCC at 464), "We have on more than one occasion in the past concluded that the Communications Act, without amendment, probably would not support broad jurisdiction, though not disclaiming jurisdiction to prevent adverse CATV impact on television broadcasting." (Footnote citing *Frontier* and 1959 report omitted.)
And the *Second Report* itself dealt with this question at length (pars. 16–18, 2 FCC 2d 725, at 732–734) and again pointed out that we had found it unnecessary, in *CATV and TV Repeater Services*, 26 FCC 403, "to pass on the question of our authority to regulate them [CATV systems] directly because of adverse effect on broadcasting" (26 F.C.C. at 431).

missioner Loevinger indicates that the CATV industry could serve effectively in this respect. But that is not the present practice of the industry on the record before us. Surely an important public-interest question is raised by this situation.

(2) CATV systems do not serve rural or less densely populated areas—it simply costs them too much to do so. If CATV operations stifle or cripple new and projected UHF stations, therefore, it means that people in the built-up areas would be receiving additional service at the expense of those in the rural areas—again a situation inconsistent with the public interest.

(3) And, finally, CATV service is a form of pay television, since people have to pay to receive such service. There are people who cannot afford, or do not wish, to pay for television service. If, then, CATV systems replace or abort UHF outlets, again people on the cable would be getting additional service at the expense of others.

Commissioner Loevinger may disagree with the above considerations, but he cannot say that they have not been stated by the Commission. They have been fully set forth and discussed. See *Second Report*, at pages 770–776. In fact, while he adhered to his earlier view that the Commission does not have jurisdiction to regulate all CATV operations, and expressed dissatisfaction with the form of the opinion, Commissioner Loevinger stated, in his separate statement attached to the *Second Report*, that he concurred in the substantive provisions of the order. While indicating that he did not think these provisions to be wholly logical or to represent the best method of dealing with the subject, he said that the result reached in the rules adopted seemed to him "the best and most reasonable proposal that has any practical chance of securing approval by a majority of the Commission." He then added: "This is, in my opinion, a legitimate basis for making a legislative judgment." It would appear to me that Commissioner Loevinger must, therefore, have agreed with the essence of the public-interest bases for the Commission's action, though he did not like the precise way in which they were formulated. If not, and he had some as yet unstated basis for joining in approving the substantive provisions of the rules, that in turn must have had some foundation in concepts of the public interest. Either Commissioner Loevinger has joined in approving our rules on the general basis restated above, or it is he, not the majority, which has failed to state the basis for his position last March.

We also set forth the two grounds for our concern that CATV might adversely affect, or indeed thwart, the present promising UHF development: The economic impact ground (*Second Report*, at pp. 770–778) and the unfair competition ground (*Second Report*, at pp. 778–781). We stated that we could not now gage the extent of that adverse impact, and that that was a matter to be explored in evidentiary hearings (par. 126). I could go on, but this would only involve repeating the lengthy discussion in the *Second Report*. When Commissioner Loevinger states that the public interest is undefined in this area, he is simply ignoring what the Commission has said.[3] He is also ignoring the public-interest policy guidance Congress laid down

[3] If Commissioner Loevinger is concerned about the carriage and nonduplication aspects of the rules, these matters were extensively treated, particularly in the *First Report*, 38 FCC 683, 699–715. In any event, they have already been found to be reasonably related to the public interest. See *Carter Mountain Transmission Corp.* v. *FCC*, 321 F. 2d 359 (C.A.D.C. 1963), cert. den. 375 U.S. 951.

for us in the 1962 all-channel receiver legislation. See, particularly, paragraph 114 of the *Second Report*.

Finally, Commissioner Loevinger states that the Commission rules "as now construed" in effect impose a freeze when a petition against new CATV service is filed under section 74.1105. The rules have not been "now construed" in such a way as to produce a result different from that originally indicated. Section 74.1105 states in explicit terms that new CATV service, against which a petition has been filed, shall not be commenced until Commission action on the petition. The *Second Report* also so stated (par. 100), and the Commission was well aware of this when it adopted the rules. I know I was, and I cannot see why Commissioner Loevinger was not also. The two-page public notice issued on February 15, 1966, simply set forth the essence of the new rules the Commission had decided to adopt, and certainly did not purport to state the detailed provisions of our action. The provision that, where a petition is filed with respect to proposed CATV service, new service shall not be commenced until after the Commission has ruled on the matter is fully consistent with the provision of the public notice cited by Commissioner Loevinger, and was necessary to prevent institution of a service upon which the public would come to rely pending Commission consideration of the matter. Experience with this problem has demonstrated the difficulty, if not impossibility, of ordering withdrawal of service once it is established. Thus, if the Commission is to give any meaningful consideration to petitions directed against proposed CATV service, it must maintain the status quo until it has had time to rule on the question.

And this is no freeze. The Commission stated that when such a controversy involving new service arose, the Commission would expeditiously rule upon the matter (*Second Report*, par. 98), and the rules so provide (sec. 74.1109(f)). I think that such 74.1109 matters should be acted upon promptly after the filing of the last pleading, and see no reason why they cannot be disposed of without undue delay. Certainly, common sense indicates that we act expeditiously before establishment of the service, rather than after the fact when our action could be disruptive. The whole thrust of the Communications Act is to this effect. See *Second Report*, paragraph 140. If there are undue delays in this respect, I would be glad to join with Commissioner Loevinger, not in scrapping a perfectly sound procedure, but rather in seeing to it that it is carried out.

Before the Federal Communications Commission, Washington, D.C.

Docket No. 16786

IN THE MATTER OF THE PETITION OF MIDWEST TELEVISION, INC. (KFMB–TV), SAN DIEGO, CALIFORNIA, FOR IMMEDIATE TEMPORARY AND FOR PERMANENT RELIEF AGAINST EXTENSIONS OF SERVICE OF CATV SYSTEMS CARRYING SIGNALS OF LOS ANGELES STATIONS INTO THE SAN DIEGO, AREA, PETITIONER

v.

MISSION CABLE TV, INC., EL CAJON, CALIFORNIA, SOUTHWESTERN CABLE CO., SAN DIEGO, CALIFORNIA, PACIFIC VIDEO CABLE CO., INC., EL CAJON, CALIFORNIA, TRANS-VIDEO CORP., EL CAJON, CALIFORNIA, RANCHO BERNARDO ANTENNA SYSTEMS, INC., LA JOLLA, CALIFORNIA, AND POWAY CABLE TV, POWAY, CALIFORNIA, RESPONDENTS

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners BARTLEY and LOEVINGER dissenting; Commissioner JOHNSON not participating.

1. The Commission has before it for consideration a petition filed on March 17, 1966, by Midwest Television, Inc. (Midwest), licensee of KFMB–TV, San Diego, California, a supplement thereto filed on April 4, 1966, and responsive pleadings in connection there-

with.[1] The petition was filed pursuant to Section 74.1107 and 74.1109 of the Commission's Rules, adopted March 8, 1966, effective March 17, 1966 (31 F.R. 4540)[2], and requests basically that the Commission immediately order respondents, pending final disposition of the petition, to cease and desist from extend-

[1] The following responsive pleadings have also been filed and considered: Comments of Jack O. Gross, (Gross) permittee of Station KJOG–TV, San Diego, filed on April 15, 1966; Opposition to petition and supplement filed by Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp. (hereafter collectively referred to as Mission) on April 18, 1966; Opposition to petition and supplement filed by Southwestern Cable Co. (Southwestern) on April 18, 1966; a Statement of Position filed by Southwestern on April 18, 1966; a Motion to Sever filed by Southwestern on April 18, 1966; a Motion to Dismiss filed by Southwestern on April 18, 1966; an Opposition and Petition to be Dismissed filed by Rancho Bernardo Antenna System (Rancho) on April 18, 1966; a Reply of Petitioner to Opposition to petition for immediate temporary relief and Answer to Motion to Dismiss petition for immediate temporary relief filed by Midwest on April 25, 1966; an Answer to Motion to Sever filed by Midwest on April 25, 1966; a Reply of Petitioner to Oppositions to petition for permanent relief and Answer to Motions to Dismiss petition for permanent relief filed by Midwest on May 2, 1966; and a Reply to Answers of Midwest to Motions to Sever and Dismiss filed by Southwestern on May 5, 1966. Additional interlocutory pleadings concerning extensions of time were filed and have been acted upon, pursuant to delegated authority. On April 6, 1966, Poway Cable TV filed a motion asking that it be dismissed as a party respondent; Midwest filed an answer stating that in view of the agreement reached, it would be appropriate to dismiss Poway as a party. We will grant this request.

[2] Section 74.1107 of the Commission's Rules relates to CATV systems operating or proposing to operate in one of the top 100 television markets and carrying distant television stations' signals. Section 74.1109 of the Rules relates to the filing of petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

ing service to additional subscribers served by their respective systems within the Grade A contours of the San Diego stations and, after any necessary hearing, issue a final order appropriately confining carriage of Los Angeles television signals by respondents' San Diego area systems. In its later pleadings, Midwest modified its initial request for temporary relief to a request that respondents be directed not to extend the Los Angeles television signals to subscribers beyond the specific geographic boundaries of areas in which subscribers were being served on February 15, 1966.

2. In support of its requests for relief, Midwest states that respondents are the holders of franchises to operate CATV systems issued by the cities of San Diego, Chula Vista, National City, La Mesa, Imperial Beach, El Cajon, and San Diego County.[3] The City of San Diego has a population of approximately 648,500 occupying 208,631 housing units and the County of San Diego has a population of approximately 1,213,000 occupying 379,483 housing units; nearly all of the county population lies within the Grade A contour of KFMB–TV and San Diego is ranked by the American Research Bureau as the 54th market based on net weekly circulation. San Diego is presently served by five television stations, a construction permit has been issued for Channel 51 (KJOG), an application is pending for Channel 15, and the assignment of an additional UHF commercial channel to San Diego is under consideration in Docket No. 14229. Midwest alleges that respondents' CATV systems carry the signals of between six and nine Los Angeles television

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[3] Trans-Video is 100% owner of Pacific Video, majority owner of Mission Cable and has a minority interest in Southwestern. It has no franchises and is a management company. Trans-Video operates under contract the CATV systems owned by and franchised to Mission, Southwestern and Pacific.

stations none of which stations provide measured or calculated Grade B service to more than the northern portion of the city of San Diego nor to any parts of six other separate communities adjacent to the city; that all of Mission's systems except Poway supply regularly eight Los Angeles stations beyond their calculated Grade B contours (Mission's Poway system carries three beyond Grade B signals and the independent Poway system carries two); that neither Poway nor Rancho Bernardo receive actual Grade B service from any Los Angeles stations; and that Southwestern supplies regularly to all of its subscribers at least three Los Angeles stations beyond their calculated Grade B contours.

3. Midwest goes on to allege that within the past year, and increasingly in recent months and weeks, there has been "widespread and intensive CATV activity within KFMB–TV's Grade A contour" and that service to Poway, Chula Vista and Pacific Beach was instituted only two to four months prior to the filing of the petition. It is alleged that the other systems have greatly extended their lines and substantially increased the number of subscribers since April of 1965; that the systems have increasingly emphasized the laying of lines, far outstripping the solicitation and hooking up of new subscribers; with cables being strung in some areas for miles with very few drops and in some cases none; and in those communities where the systems are operational or wired, only portions of such communities are involved. Midwest estimates that as of February 15, 1966, there were 17,000 homes in the county and within the station's Grade A contour connected to cable systems, of which approximately 6,500 were located in the city; that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are at present approximately

294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and this figure represents approximately 78% of all homes in the county within the Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are alleged to be in areas covered by CATV franchises. Because of the alleged emphasis on line extensions rather than on hook-ups, Midwest contends that a large number of new subscribers could be wired up in a relatively short time even if there were no further cable expansion.

4. Midwest contends that the importation of a multiplicity of distant signals will, if allowed to expand, fragment and drastically reduce the local stations' viewing audience notwithstanding the non-duplication rules. Midwest points out that in its case, 44% of its programming is non-network and will be subject to duplication and that, with respect to the San Diego independent stations, nearly 100% of their programming will be subject to duplication; that virtually all of the non-network recorded programs now under contract to the San Diego stations are also under contract or available to the Los Angeles stations; that the importation of such programs impairs their value to the San Diego stations and causes audience losses, eventually resulting in reduced advertising revenues and curtailed local and quality programming; that over 94% of the Los Angeles programs carried on the respondents' systems in a given week have been, are being, or will be duplicated on San Diego stations in the same form or by way of San Diego equivalents; and analysis of the remaining 6% indicates that the same public interest is or would be served in an alternate way by the San Diego stations.

5. Midwest also alleges that respondents' systems,

with the exception of Poway Cable TV, carry the signal of KFMB–TV on channel but materially degrade the quality of the signal broadcast, particularly the color signals; that the signal of the local UHF station, KAAR, is markedly worse on the cable than those of the VHF stations; that the signals of the Los Angeles stations appear better on the cable than those of the local stations despite the fact that the Los Angeles stations generally do not place a Grade B signal over San Diego; and that the effect of degradation has been not only to damage the local station's reputations but has placed the distant signals on a higher competitive level than the local signals.[4] Finally, Midwest contends that in addition to the foregoing considerations, the CATV situation in San Diego falls squarely within the principle enunciated in the *Second Report* in footnote 69, where the Commission pointed out that, although, in general, CATV activity which does not involve extension of a signal beyond its Grade B contour may continue, an important exception exists where two major markets fall within one another's Grade B contours. In such a situation, the carriage by a CATV system in Baltimore, for instance, of the Washington signals might equalize the quality of the distant signals, change the viewing habits of the local population and affect the development of local television stations. Midwest contends that the San Diego-Los Angeles situation is a classic illustration of this problem and that relief should be afforded on this basis as well as the basis previously set forth.

[4] Midwest states that because of degradation, the Pacific Beach system carries KFMB–TV on Channels 8 and 2, but that this dual carriage confuses the public, weakens its station identification and causes possible ratings losses.

6. In view of the above, Midwest requests, essentially, that the Commission issue a final order appropriately confining carriage of Los Angeles signals by respondents' systems and that, if a hearing is necessary, the respondent be ordered to confine delivery of the Los Angeles signals to subscribers located within the specific geographic boundaries inside of the general geographic areas where the systems were operating on February 15, 1966.[5] In a document filed on April 15, 1966, Jack O. Gross, holder of a construction permit for UHF station KJOG-TV, Channel 51, San Diego, supports the Midwest petition and states that a grant of the requested relief would materially contribute to the success of UHF in San Diego generally and KJOG in particular.

7. Mission's opposition, filed on behalf of Mission, Pacific and Trans-Video, contends that the Commission can only issue temporary relief in accordance with the provision of Section 312 of the Communications Act (47 U.S.C. 312(c)) and that there is no statutory authority for the type of relief requested. Mission contends that such relief is analogous to a motion for stay and that, as such, it is inadequate be-

[5] In support of its request for temporary relief pending the outcome of any hearing, and in an attempt to describe the extent of respondents' operations in San Diego and southwestern San Diego county as of February 15, 1966, Midwest filed a Supplement to its petition, to which it attached a map purporting to show that there were eight separate islands of CATV subscriber service as of February 15, 1966 located in recognized geographical areas in San Diego which were further circumscribed by recognizable and known geographical limitations and boundaries within the larger geographical areas. In the Supplement, Midwest alleges that since February 15, 1966, the respondents have extended lines and service beyond the specific boundaries within the general areas and also into entirely new geographic areas.

cause Midwest has failed to show irreparable injury to itself (Mission contends that Midwest's allegations in this regard are only conclusionary and not supported by material facts); has failed to demonstrate injury to the public (Mission contends that allegations in this regard are also conclusionary and highly speculative and denies that there is any degradation of the San Diego stations' signals by the CATV systems); and has not demonstrated that there is a likelihood that it will succeed on the merits (Mission contends that Midwest's allegations relating to a "pell-mell" extension of cable lines are completely unsupported by facts, is untrue, and that respondents have merely continued their normal wiring activity).

8. Mission alleges further that there is nothing in the rules which prohibits the actions of respondents which Midwest seeks to prevent since the rules speak of extension of signals to "new geographic areas" and Midwest has not factually supported its allegation that there has been such an extension. Further, Mission contends, Midwest has failed to show that the signals extended are beyond predicted Grade B and it is Mission's position, in any event, that its Poway system is "grandfathered" under the rules since it was franchised under the San Diego county franchise; service had commenced prior to March 17, 1966, and the county-wide franchise authorized CATV at any place in San Diego county outside of corporate limits.[6] Mission states that the outside-of-corporate

[6] Midwest had alleged, in its petition, that Mission's system in Poway had commenced operations after February 15, 1966 in violation of Section 74.1107 of the Rules, and requested that the Commission issue a cease and desist order as to said system. On April 6, 1966, after an independent inquiry, the Commission issued an Order to Show Cause why a cease and desist order should not be issued with respect to the Poway operation. FCC

limits construction in San Diego has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Finally, Mission alleges, with respect to the request for temporary relief, that the public will be irreparably injured since it ignores the need for expansion of television service, prevents expansion of educational television, deprives the public of improved color reception, municipalities of revenues from CATV and potential subscribers of the same choice of programs that their neighbors who have already subscribed have; that respondents will be irreparably injured since their franchises may be forefeited if construction is delayed, contract rights may be lost, and respondents' employees may lose their jobs; the Commission's Rules are yet untested and are probably illegal; and the rights of Midwest or the public can be fully protected by a decision on the merits, after a hearing, if the Commission determines that any action is required.

9. As to Midwest's request for permanent relief, Mission incorporates its same arguments with respect to the request for temporary relief and contends further that its franchises were obtained before the Commission decided to exercise jurisdiction and that construction and installation of cable was started before February 15, 1966 or March 17, 1966. Additionally, Mission alleges that while CATV is a less expensive and more convenient type of antenna service for signals already present in San Diego, CATV is needed in certain areas in order to provide adequate reception of San Diego Channel's 8 and 10 and that

66-292, April 6, 1966. On June 22, 1966, the Commission issued a Cease and Desist Order as to Mission's Poway system. FCC 66-548.

CATV expansion is necessary for the acceptance and viability of UHF stations. Mission points out that since the San Diego stations' programs can not be duplicated on the same day and surveys show that during prime time the San Diego stations have 84% of the viewing audience, it does not appear that fragmentation of the remaining 16 to 20% of the television audience, among the four or five Los Angeles independents and the San Diego UHF, could have any serious impact on the ability of the San Diego network stations to continue their operations. Finally, Mission contends that the addition of subscribers to its systems after February 15, 1966, does not constitute extensions to new geographical areas since, under its city franchises, the appropriate geographic boundaries are the city limits and, under its county franchises, the appropriate boundaries are the unincorporated areas of the county.[7] In view of all of the above, Mission requests that Midwest's petition, both as to temporary and permanent relief, be denied.

10. Southwestern filed an Opposition, a Motion to Sever, and a Motion to Dismiss.[8] In its pleadings, Southwestern alleges that the petition must fail since Midwest has failed to show that its system is carrying beyond Grade B signals and that Southwestern's engineering studies show that the commercial television signals which it is carrying are all of Grade B intensity. Southwestern further contends that its sys-

[7] Mission submitted a map with its opposition showing the area of each franchise; the portion of each franchise receiving service prior to February 15, 1966; the portion of each franchise receiving service after February 15, 1966; and the portion of each franchise which was "fielded" and/or under construction as of April 12, 1966.

[8] Southwestern also filed a Statement of Position which is being treated in connection with the petitions for reconsideration of the Second Report and Order.

tem is "grandfathered" since it began operating prior to February 15, 1966, is not expanding throughout the entire community or into new areas, and has only continued normal wiring operations. Moreover, Southwestern alleges that its system helps UHF and that while Midwest has submitted no probative data regarding impact, Southwestern's market study, a copy of which it attached as an exhibit to its opposition, shows that CATV helps UHF generally and Channel 30 specifically since carriage of the UHF station on the cable increases the station's audience, improves its picture quality, and provides greater penetration for, and viewing frequency of the station. Southwestern also points out that Midwest's claim of signal degradation does not relate to its system since it has always carried Midwest's station on channels 8 and 2 of the cable. Southwestern also claims that its franchise area is unique since the residents and antennas in that area are oriented to the Los Angeles stations and since it is within the predicted or measured Grade B contours of the commercial signals of the stations carried on its system. Southwestern contends that Midwest's showing of fragmentation has no applicability to its system since the survey was conducted in a part of San Diego where the off-the-air reception of the Los Angeles stations is of less quality, the survey was conducted prior to the commencement of service by Southwestern and the various sections of San Diego vary significantly, and the audience survey findings relate to areas of San Diego where the CATV systems carry the full schedules of the Los Angeles CBS and NBC stations while Southwestern's system carries only the San Diego CBS and NBC stations. Finally, Southwestern alleges that while Midwest has failed to show that it would be irreparably injured by denial of the temporary relief, Southwestern would

suffer irreparable injury since a grant of temporary relief would dry up Southwestern's financing and cause bankruptcy. As to the request for permanent relief, Southwestern contends that while Midwest has essentially requested the Commission to designate a "Carroll" type issue, it has completely failed to furnish detailed evidentiary material. Accordingly, Southwestern requests that it be severed from the other respondents and that the petition and supplement, insofar as they relate to it, be denied or dismissed.

11. Rancho Bernardo, in its opposition, states that it operates a system in northern San Diego under a franchise from the city of San Diego and that the system is part of a housing development of 5,400 acres, approximately 400 acres of which have been developed. The system is designed to serve only the residential community and there is no intention of extending beyond those boundaries. Rancho Bernardo states that there are now approximately 1,000 subscribers to the system or 99% of the occupied housing units and service is expanding in an orderly fashion to serve all the new residential units with the timing of service extension being determined solely by the sales of residential units. Rancho Bernardo contends that the area receives unsatisfactory off-the-air television reception, is not within the Grade A contour of KFMB–TV, and may be within the Grade B contours of some Los Angeles stations. Rancho Bernardo denies that it degrades the KFMB signal and alleges that a grant of temporary relief would irreparably injure it because it would impede the sales of homes and would not help KFMB since it would make its signal unavailable in the area. Rancho Bernardo requests denial of the temporary and permanent relief and asks that it be dismissed from the proceedings.

12. In its responsive pleadings, Midwest points out that there is no factual dispute as to Mission's and Southwestern's intentions to continue expansion throughout the various geographic areas covered by their franchises. Midwest contends that temporary relief is necessary to prevent this great expansion of these major market systems until resolution of the public interest questions presented. Midwest alleges that, similarly, with limited exceptions, there is no real dispute as to the regional and specific geographic areas described by it; that since respondents have not wired up all of the homes within the specific geographic areas designated, restriction to such areas, *pendente lite,* would not prevent normal wiring operations; and that, therefore, there is no showing by respondents that an interim stay would impair the ability of the systems to continue operations. Midwest alleges that Mission makes no claim that its viability would be impaired and that Southwestern's claim of irreparable injury assumes a total prohibition against new subscribers; Southwestern does not claim that if it were limited to new subscribers within the specific geographic areas designated as of February 15, 1966, it would be irreparably injured.

13. Specifically, with respect to Mission, Midwest alleges that it has offered no factual information to refute the allegations of rapid line expansion; that Mission's map, in large part, confirms the boundaries specified by Midwest and, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966; that Mission's arguments regarding need for CATV service are invalid because 1) the entire public will lose if the local stations are forced off the air or required to curtail operations and 2) over 94% of the Los Angeles stations' programs have been, are, or will be essen-

tially duplicated by the programming of the San Diego stations; and that irreparable injury to Mission's systems has not been demonstrated since 1) there has been no showing that Mission's systems were not viable as of February 15, 1966, 2) there has been no showing that its franchises or contracts *will* expire or be forfeited if interim relief is granted (Midwest points out that the franchises do not require carriage of the Los Angeles stations and that the systems could expand without restriction carrying only San Diego signals); and 3) employee lay-off would occur only if respondents were ordered to halt all normal wiring and hook-up of new subscribers, but this has not been requested. Mission's county-wide grandfathering argument, contends Midwest, completely ignores the meaning of paragraph 149 of the Second Report and Order.

14. Midwest alleges, in response, that Southwestern does not challenge Midwest's designation of appropriate geographic areas and that since there are thousands of residents in these areas not yet on the cable, a grant of temporary relief as to Southwestern would not halt its normal wiring activities (Southwestern claims about 900 subscribers at present). Further, Midwest alleges, Southwestern's argument as to being "grandfathered" in the entire franchised area, because it was serving 350 subscribers on February 15, 1966, completely ignores the import of the Second Report and Order; Southwestern's attempt to show that its franchised area receives Grade B signals from Los Angeles is completely inadequate from an engineering standpoint and its market survey techniques are defective and its conclusions unsupported.[9] Finally, Midwest contends that while South-

[9] Midwest points out that while cable subscribers interviewed had two UHF stations available to them (Channel 28, Los

western's allegations concerning impact relate to the short run benefits to UHF of carriage on CATV, these benefits decrease as penetration of all-channel receivers increases and that Southwestern has set forth no basis for being treated differently than the other respondents in this proceeding.[10] As to Rancho Bernardo, Midwest states that in light of the representations as to extension Midwest will not press its request for temporary relief. However, Midwest contends that no basis has been shown for dismissal of Rancho Bernardo from the proceeding; that dismissal of Rancho Bernardo would have the effect of grandfathering an area 1350% larger than the area in which service is presently being rendered; and that no allegation has been made that Rancho Bernardo's participation would constitute a hardship to it or cause it damage.

15. With respect to its request for permanent relief, Midwest states that the real issue is whether CATV should be allowed to import distant signals which would result in impairing the service capabili-

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Angeles, and 39, San Diego) the Los Angeles UHF is not available off the air, and the survey only proves, at most, that viewers with two available UHF stations to watch, will view UHF 1.77 times as much as viewers with one, and that, if UHF viewing by cable subscribers is divided equally between the two stations, Channel 39 is viewed 11% fewer times in cable homes than in non-cable homes. Midwest also pointed out that the survey proved nothing as to reception quality on cable since no distinction was made between Channels 28 and 39 and it was not determined whether the non-cable homes surveyed had UHF antennas.

[10] Southwestern, in its responsive pleadings, repeats its allegations that its franchise area does receive Grade B signals from Los Angeles and that its system does not degrade the signals of KFMB–TV. It also attached a supplementary economic report purporting to show that CATV carriage does help UHF generally and Channel 39 specifically.

ties of network stations and threaten the continued existence or commencement of UHF stations; that carriage provides only short-run benefits to UHF stations; and that same-day non-duplication is insufficient because it has little relevance to non-network programs. In conclusion, Midwest requests that the Commission set the matter for hearing on the issues raised in the petition for permanent relief; that pending final disposition, the respondents be directed not to extend the Los Angeles stations' signals beyond the boundaries previously specified; and that Southwestern's motion to dismiss the petition for temporary relief and Rancho Bernardo's petition to be dismissed from the proceeding be denied.

16. We think Midwest has presented a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area. At paragraph 149 of the Second Report and Order (2 F.C.C. 2d 725), after stating our policy with respect to "grandfathering" the existing operations of CATV systems, we stated:

> We turn now to the question whether systems extending signals beyond their Grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographic areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in

> an evidentiary hearing). While there may be a disruptive factor in halting CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, appropriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the geographical extension of the CATV system to new areas, and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and response in the particular case, whether such temporary relief is called for, and if so, its nature.

This case falls squarely within the terms of the policy stated above. There is considerable UHF activity currently under way in San Diego with KAAR (ch. 39) in operation until November, 1965, with an application pending for educational Channel 15, with an outstanding construction permit for Channel 51 (KJOG–TV) and plans to commence operation in the near future. Several of Mission's systems, and Southwestern's system, commenced operations only some two to four months prior to the filing of the petition herein. In view of the size of the area involved (approximately 380,000 housing units in San Diego County), while the respondents' systems have relatively few subscribers, pursuant to their franchises, they have the potential for expanding throughout the entire county.

17. In this latter connection, Midwest has pointed out, and respondents have not denied, that there were

on February 15, 1966, approximately 17,000 CATV subscribers in the county and within KFMB–TV's Grade A contour, of which approximately 6,500 were located in San Diego. It was further pointed out that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are approximately 294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and that this represents approximately 78% of all homes in the county within the station's Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are located in areas covered by CATV franchises. Mission states that construction in unincorporated communities in San Diego County has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Thus, it clearly appears that a hearing is required with respect to the over-all question of whether such potential expansion in this major market is consistent with the public interest. Further, unless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief appropriately limiting further expansion until resolution of the public interest issues is called for.

18. A hearing is also appropriate here because of

the number of unresolved issues present. For instance, there is disagreement as to whether some of respondents' systems are operating within the predicted Grade A contour of KFMB–TV; there is controversy as to whether some of the respondents' systems operate within the Grade B contour of some of the Los Angeles stations carried on the system (but in this respect, see also par. 19, *infra.*); there is a serious question as to whether respondents' systems degrade the San Diego signals carried and particularly the signals of KFMB–TV; the degree of CATV penetration of the market is contested; and, of course, there is controversy as to whether carriage on the systems will help or hurt new or prospective UHF stations in San Diego. These issues are all particularly appropriate for resolution in an evidentiary hearing. We wish to stress that, in view of the importance and novelty of the matters raised, we think considerable latitude should be afforded as to the introduction of evidence on all of these matters.

19. Some of the respondents have alleged that since their systems operate within the predicted or measured Grade B contours of the Los Angeles stations carried on their systems, the provisions of paragraph 149 of the Second Report, *supra,* which relate generally to extension of beyond Grade B signals, do not apply to their systems and that they may, therefore, continue to expand without hindrance. This contention, however, misconceives the main thrust of our major market policy. The Commission's primary concern with respect to CATV operations in the major markets importing distant television signals was whether such operation "may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial

competition of a patently unfair nature" (Second Report, Paragraph 139). We defined "distant signals" as those signals extended or received beyond the Grade B contours of those stations. While this standard will generally encompass our main area of concern (i.e., the importation of signals not allocated to the area), it is by no means a fixed and immutable standard to which we will blindly adhere. As we pointed out in the Second Report, CATV activity which does not involve extension of a signal beyond the Grade B contour may continue, "* * * with possibly only the rarest exception * * *." (Second Report, paragraph 151). This exception involves a situation where, for instance, two major markets fall within one another's Grade B contours and the importation of signals of the stations in one market into the other would equalize the quality of the distant signals, possibly change the viewing habits of the latter community and affect the development of independent UHF stations there. Assuming, *arguendo,* as respondents contend, that their systems are within the predicted or measured Grade B contours of the Los Angeles stations, this is exactly the situation presented here. The Los Angeles stations are located more than 100 miles from the San Diego main Post Office and, while they may provide service to some parts of San Diego, the issue is what kind of service as compared to that of the local San Diego stations, and what is the effect on the latter of CATV which "equalizes" the technical quality of the local San Diego signals and the more than 100 mile distant Los Angeles stations. Thus, the problem is not resolved merely by a showing that the Los Angeles stations do provide Grade B signals to parts of San Diego County.

20. It is clear, therefore, that a hearing is necessary with respect to the overall question of CATV expan-

sion in this major market and that some form of temporary relief is necessary and appropriate "before consequences possibly adverse to the public may develop." Before discussing the nature and form of the temporary relief to be prescribed, there are three matters raised by respondents which we will briefly discuss.

21. First, respondents Mission and Southwestern contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any sort of interim action pending a hearing. However, we have determined in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." Section 4(i). See also Sections 303 (f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see *Federal Trade Commission* v. *Dean Foods Co.*, —— U.S. ——, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the

authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See *Public Service Commission* v. *Federal Power Commission,* 327 F. 2d 893, 896–897 (C.A.D.C., 1964).

Second, respondents Mission and Southwest contend that their systems are grandfathered to the limits of their franchises. We reject this position, since it is totally inconsistent with the policy expressed in paragraph 149 of the second report (see, also Letter to Telerama, Inc., 3 FCC 2d 585). Finally, respondents contend that a grant of temporary relief will cause them irreparable injury.[11] Mission's showing in this regard, however, is speculative, unsubstantiated, and proceeds on a mistaken understanding of the nature of the relief requested. Southwestern furnished an affidavit from a vice president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, *pendente lite,* if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional subscribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed

[11] Midwest has withdrawn its request for temporary relief as to Rancho Bernardo.

unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they

limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if some form of temporary relief is ordered.[12] We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration.

22. The question now is the nature and form of the temporary relief to be afforded. In its petition, and particularly the supplement thereto, Midwest specified with great particularity and precision "eight separate and discrete islands of CATV subscriber service as of February 15, 1966," alleging that these "islands" were located in recognized geographical areas in San Diego and that the islands were further circumscribed by recognizable and known geographical areas. These latter areas were also described with great precision and it was alleged that from the eight islands, as they existed on February 15, 1966, the respondents have extended and are continuing to extend their lines and service beyond the boundaries within the geographical areas which they partially occupied and, also, into new geographical areas. Midwest asks essentially, that pending final disposition, respondents be ordered to confine delivery of Los Angeles signals to subscribers located within the geographical boundaries inside of the eight general area which circumscribe the areas

[12] We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

where the systems were operating on February 15, 1966.[13]

23. Neither Mission nor Southwestern has factually challenged Midwest's description and specification of the geographic areas and their boundaries. Rather, they take the position that their franchise areas constitute the appropriate geographic limitations. We have, however, rejected this contention (see paragraph 21, *supra*). Mission, with its opposition, submitted a detailed map which, in part, indicates for the entire area where systems were operating on February 15, 1966. Midwest states in its reply that the map, in large part, confirms the boundaries specified by it in its supplement and that, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966. We have also reviewed the map and compared it with the specific boundaries detailed in Midwest's supplement and it appears that, with the exception of the Chula Vista area, the parties are largely in agreement as to the boundaries of the areas where Mission was operating on Februry 15, 1966.

24. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Mission to confine delivery of the Los Angeles signals carried on its systems to subscribers within those areas where Mission indicated in its map (appended as attachment G to its opposition) it was operating on February 15, 1966. We will also accept Mission's map designation with respect to the Chula Vista area, provided, however, that our

[13] Midwest has indicated in a subsequent pleading that it does not object to dismissing Poway Cable TV from the proceeding and that it is not pressing its request for temporary relief as to Rancho Bernardo. Accordingly, we are only concerned with framing temporary relief as to Mission's and Southwestern's systems.

action with respect to Chula Vista is without prejudice to any further showing Midwest may present to support its position as to the geographic boundaries, as of February 15, 1966, of the area served by Mission's Chula Vista system. Upon an appropriate showing, we will give further consideration to Midwest's request to further restrict the Chula Vista system pending final disposition of this proceeding.

25. As to Southwestern, we have previously noted that it has not challenged Midwest's designation of the general and specific areas within which it was operating on February 15, 1966. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Southwestern to confine delivery of the Los Angeles signals carried on its system to subscribers within those areas specified by Midwest in its supplemental petition (paragraphs (A)(1) and (B)(1), pages 10 and 12, respectively, and affidavit, paragraph 5(1), pages 2 and 3), appended thereto. This action will be subject to any further showing Southwestern may wish to present to show that the geographic boundaries of the area in which it was operating as of February 15, 1966, differ from these specified by Midwest. Upon an appropriate showing and request, we will give further consideration to the question of appropriate February 15, 1966, boundaries of Southwestern's systems.

26. It should be noted with respect to the temporary relief described above that both Mission and Southwestern are free to continue to construct lines and add new subscribers and to carry the Los Angeles signals within the specific geographic areas described above. As indicated, it would appear that there are substantial numbers of potential new subscribers located in those areas. Further, Mission and Southwest-

ern may continue to expand their systems within their franchised areas so long as the expansion is confined to the carriage of the San Diego-Tijuana signals. And, finally, respondents may continue their present service to any persons who began receiving service, or who had signed and submitted an accepted subscription request, between February 15, 1966, and the date of this order. As indicated in the Second Report, we have no desire to cause disruption of existing service and we do not, in any event, believe that a roll back is either practical or necessary. While we recognize that the temporary relief which we are ordering may, to some extent, discommode respondents' operations, we do not think that it will cause respondents either substantial hardship or irreparable injury. To the extent that there is some disruption of existing operations and future plans, we find that it is necessary in the public interest.

27. Accordingly, in view of the above, and pursuant to Sections 74.1109 and 74.1107(a) and (d) of the Commission's Rules, IT IS ORDERED, that this proceeding is hereby DESIGNATED FOR HEARING, at a time and place to be specified in a further order, upon the following issues:

1. To determine the locations of trunk and feeder lines (both energized and unenergized) and the location and number of subscribers per half mile (or other comparable convenient unit of measure) or cable to respondents' respective CATV systems as of February 15, 1966, March 17, 1966 and the date of this order, and the locations of the predicted Grade A contours of the San Diego television stations and predicted Grade B contours of the Los Angeles television stations.

2. To determine whether the signals of any of

the San Diego television stations are degraded on any of respondents' respective CATV systems and, if so, the cause, extent and nature thereof.

3. To determine the present actions and plans for the future of respondents with respect to the initiation of pay-TV operations based upon or in connection with their respective CATV operations.

4. To determine the present penetration of CATV service by CATV systems in the San Diego market area and the potential penetration of CATV service under conditions of unlimited expansion.

5. To determine the effects on the audiences of existing, proposed, and potential San Diego television stations of present penetration and of potential penetration under conditions of unlimited CATV expansion.

6. To determine the effects of present service and of unlimited expansion of service by CATV systems, generally, on off-the-air television service from the San Diego television stations and, particularly, on existing, proposed and potential UHF television service in the area.

7. To determine whether any conditions of future imports should be placed on the present operations of respondents' CATV systems and, if so, the nature thereof.

8. To determine whether expansion of any of respondents' CATV systems should be limited and, if so, the appropriate conditions thereof.

9. To determine, in light of the foregoing, whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission.

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It is further ordered, that Midwest Television, Inc. the Chief, Broadcast Bureau, Mission Cable TV, Inc., Southwestern Cable Company, Pacific Video Cable Company, Inc., Trans-Video Corp., Rancho Bernardo Antenna Systems, Inc., and Jack O. Gross, are made parties to this proceeding.

It is further ordered, that respondents have the burden of proceeding and the burden of proof with respect to issue 1; that with respect to issue 2, petitioners have the burden of proceeding and the burden of proof; that respondents have the burden of proceeding and the burden of proof with respect to issue 3; that respondents have the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to respondents' respective CATV systems, and that petitioner has the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to CATV systems other than those of respondents; that petitioner has the burden of proceeding and the burden of proof with respect to issues 5 thru 8.

It is further ordered, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. are directed to limit the operations of their respective CATV systems as set forth in paragraphs 24-26, *supra.*

It is further ordered, that the Motion to Dismiss filed by Poway Cable Television is granted and it is dismissed as a party to this proceeding.

It is further ordered, that the Motion to Sever and the Motion to Dismiss filed by Southwestern Cable Co. and the Petition to be Dismissed filed by Rancho Bernardo Antenna Systems, Inc., are denied.

It is further ordered, that the request for oral argument of Mission Cable Television, Inc., Pacific Video Cable Co., Inc. and Trans-Video Corp. is denied.

It is further ordered, that the petition filed by Midwest Television, Inc., and the supplement thereto, to the extent indicated above, is granted, and, in all other respects, is denied.

It is further ordered, that, to avail themselves of the opportunity to be heard, the parties herein, pursuant to Section 1.221 (e) of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate a written appearance stating their intention to appear on the date set for the hearing and present evidence on the issues specified in this Order.

It is further ordered, that the ruling as to temporary relief shall be effective on the 3rd day, not counting Saturdays, Sundays and holidays, after the day of release of this opinion, provided that the ruling on temporary relief shall not be effective until judicial determination of the motion for a stay in the case of any respondent which notifies the Commission within two days that it intends to seek judicial review and which seeks judicial review and a judicial stay within 14 days of the day of release of this opinion.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

Adopted: July 20, 1966.
Released: July 25, 1966.

Before the Federal Communications Commission,
Washington, D.C.

Docket No. 16786

IN THE MATTER OF THE PETITION OF MIDWEST TELEVISION, INC. (KFMB–TV), SAN DIEGO, CALIFORNIA, FOR IMMEDIATE TEMPORARY AND FOR PERMANENT RELIEF AGAINST EXTENSIONS OF SERVICE OF CATV SYSTEMS CARRYING SIGNALS OF LOS ANGELES STATIONS INTO THE SAN DIEGO, AREA, PETITIONER

v.

MISSION CABLE TV, INC., EL CAJON, CALIFORNIA, SOUTHWESTERN CABLE CO., SAN DIEGO, CALIFORNIA, PACIFIC VIDEO CABLE CO., INC., EL CAJON, CALIFORNIA, TRANS-VIDEO CORP., EL CAJON, CALIFORNIA, RANCHO BERNARDO ANTENNA SYSTEMS, INC., LA JOLLA, CALIFORNIA, AND POWAY CABLE TV, POWAY, CALIFORNIA, RESPONDENTS

ERRATUM

In the Commission's Memorandum Opinion and Order in the above-entitled proceeding, released July 25, 1966, FCC 66-683, 86406, paragraph 21 is corrected to read as follows:

"21. First, respondents Mission and Southwestern contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any sort of interim action pending a hearing. However, we have determined in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform 'any and all acts, make such rules and regulations, and issue such orders, not inconsistent with

[the] Act, as may be necessary in the execution of [our] functions.' Section 4(i). See also Sections 303 (f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see *Federal Trade Commission* v. *Dean Foods Co.*, —— U.S. ——, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See *Public Service Commission* v. *Federal Power Commission*, 327 F. 2d 893, 896–897 (C.A.D.C., 1964). Second, respondents Mission and Sutohwest contend that their systems are 'grandfathered' to the limits of their franchises. We reject this position since it is totally inconsistent with the policy expressed in paragraph 149 of the Second Report (see, also, *Letter to Telerama, Inc.*, 3 FCC 2d 585). Finally, respondents contend that a grant of temporary relief will cause them irreparable injury.[11]

[11] Midwest has withdrawn its request for temporary relief as to Rancho Bernardo.

Mission's showing in this regard, however, is speculative, unsubstantiated, and proceeds on a mistaken understanding of the nature of the relief requested. Southwestern furnished an affidavit from a vice-president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, *pendente lite,* if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional subscribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if

some form of temporary relief is ordered.[12] We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration."

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

Released: July 26, 1966.

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[12] We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

[Filed - August 23, 1966]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHWESTERN CABLE CO.,
Petitioner,

v.

No. 21183

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO.,
and TRANS-VIDEO CORP.,
Petitioners,

v.

No. 21192

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

INTERLOCUTORY INJUNCTION

Before: HAMLEY, BROWNING and DUNIWAY, Circuit Judges

Southwestern Cable Co., having petitioned this court, pursuant to section 402(a) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C. § 402(a) (1964), and sections 2 and 3 of the Judicial Review Act of 1950, as amended, 64 Stat. 1129 (1950), 5 U.S.C. §§ 1032, 1033 (1964), to review the Memorandum Opinion and Order of the Federal Communications Commission (Commission) released July 25, 1966, as corrected in an Erratum released July 26, 1966; and

Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp., having likewise petitioned this court, pursuant

to the same statutes, to review the described order of the Commission; and

All petitioners having applied to this court, pursuant to section 9(b) of the Judicial Review Act of 1950, 5 U.S.C. § 1039, to issue an interlocutory injunction staying the effectiveness of the described order of the Commission, pending final disposition of the petitions to review, and having obtained from a judge of this court, on August 10, 1966, orders staying the following portions of the described Commission order:

> "IT IS FURTHER ORDERED, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. ARE DIRECTED TO LIMIT the operations of their respective CATV systems as set forth in paragraphs 24-26 *supra*."

insofar as the quoted portion of the order refers to petitioners and to paragraphs 25 and 26, with the proviso in each such stay order, that the same is subject to reconsideration by this court in the event that respondent Commission files with this court its objections to the relief granted herein within thirty days of the date of the stay orders; and

United States of America and the Commission, respondents herein, having timely filed a motion for reconsideration of the stay orders and their opposition to the granting of an interlocutory injunction herein, and the matter having come on for hearing before this court on August 22, 1966, on due notice, all petitioners and respondents being represented by counsel; and the court having granted the motion of respondents to consolidate the two review proceedings for all purposes; and having granted the motions of Midwest Television, Inc., Jack O. Gross, and San Diego Telecasters, Inc., for leave to intervene in the consolidated proceedings; and the intervenors having filed a joint opposition to the application for an interlocutory injunction, and being represented at the hearing by counsel; and

The court finding, on the basis of affidavits of Richard A. Moore and K. C. Hawkins attached to the application of Southwestern Cable Co. for an interlocutory injunction, and the affidavit of K. C. Hawkins attached to Southwestern Cable Co.'s opposition to motion for reconsideration, that if that petitioner is required, pending the disposition of this review proceeding, to desist from adding new subscribers to its presently existing trunk and feeder lines, it in all probability will be unable to extricate itself from its present financial difficulties and may be forced to suspend all operations; and in any event will lose substantial and irretrievable gross income, thereby causing irreparable damage; and

The court further finding, on the basis of the affidavit of Henry R. Goldstein, attached to the application of Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp., that if those petitioners are required, pending the disposition of this review proceeding, to desist from adding new subscribers to their presently existing trunk and feeder lines, they will lose substantial and irretrievable gross income, their franchises may be endangered, and the resulting curtailment of operation will require those petitioners to lay off a substantial number of highly skilled workmen, thereby causing irreparable damage; and

The court further finding that respondent Commission concedes that none of the petitioners is presently in violation of the governing statutes and Commission rules with respect to any of the matters dealt with in the described Commission order, and further finding that the public interest requires that an interlocutory injunction issue, now therefore IT IS

ORDERED, that pending the final disposition of these review proceedings, that portion of the Memorandum Opinion and Order of the Commission released July 25, 1966, as corrected in an Erratum released July 26, 1966, which reads as follows:

> "IT IS FURTHER ORDERED, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. ARE DIRECTED TO LIMIT the operations of their respective CATV systems as set forth in paragraphs 24-26, *supra*."

is hereby stayed insofar as it would require the named companies to desist from adding new subscribers to their trunk and feeder lines in existence on August 23, 1966; and IT IS

FURTHER ORDERED, that the stay orders entered herein on August 10, 1966, are hereby vacated; and IT IS

FURTHER ORDERED, that if the Commission is so advised, it may apply for an order expediting these review proceedings.

DATED: August 23, 1966.

Frederick G. Hamley
James R. Browning
Ben. C. Dunniway
United States Circuit Judges

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SOUTHWESTERN CABLE CO., *Petitioner,* vs. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents,* JACK O. GROSS, et al., *Intervenors.*	No. 21,183
MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP., *Petitioners,* vs. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents,* JACK O. GROSS, et al., *Intervenors.*	No. 21,192

[April 28, 1967]

On Petition for Review of a Memorandum Opinion and Order of the Federal Communications Commission

Before: BARNES and ELY, Circuit Judges; PECKHAM,* District Judge

BARNES, Circuit Judge:

This is a consolidation of two petitions to review and set aside portions of an order of the Federal Communications Commission

*Robert F. Peckham, Northern District of California, sitting by designation.

(hereinafter "FCC" or "Commission"). Our jurisdiction rests upon 5 U.S.C. § 1032 and 47 U.S.C. § 402(a).

Southwestern Cable Company owns a community antenna television system (commonly designated a CATV system) in the San Diego area. Mission Cable TV, Inc. and Pacific Video Cable Company own CATV systems in the San Diego area which are operated by Trans-Video Corporation which owns all of Pacific and a majority of Mission.

CATV is a way of delivering good television reception to areas greatly removed from the originating station. The concept includes the building of a large antenna in an area where reception is good. The antenna picks up the signal of one or more stations and transmits it or them, either by wire or microwave, to the area of poor reception. In the poor reception area the signal is distributed to individual television receivers by wire, each receiver paying installation and monthly service fees. Southwestern, Mission and Pacific, petitioners here, all use cable systems rather than microwave for transmission of the signals.

San Diego is about 120 miles south of Los Angeles. San Diego is served by two VHF and one UHF television stations in San Diego and two VHF stations in nearby Tijuana, Mexico. A construction permit has been issued for another UHF station, and an application is pending for still another. For the most part, San Diego receivers cannot receive the signals of Los Angeles stations through the air. It is by CATV that many San Diegans can now watch Los Angeles programs.

The recent growth of CATV systems has come to the attention of the FCC. At first the FCC, without dissent, held it had no jurisdiction over CATV. 26 F.C.C. 403, 427-28 (1959). It next held it was authorized to deny a CATV microwave transmission license for economic reasons. *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962, *aff'd* 321 F.2d 359 (D.C. Cir. 1963)), *cert. denied* 375 U.S. 951 (1963). It then asserted jurisdiction only over CATV systems using microwave facilities to transmit their signals. See First Report and Order, 38 F.C.C. 683, 30 Fed. Reg. 6038 (1965). On April 23, 1965, the Commission released a Notice of Inquiry and Notice of proposed Rule Making (1 F.C.C.2d 453, 30 Fed. Reg. 6078 (1965)) looking toward regulation of all CATV systems. On February 15, 1966, the Commission issued a news

release announcing that new rules would shortly be adopted applying to non-microwave CATV systems. These rules were adopted on March 8, 1966, and published on March 17, 1966. Second Report and Order, 2 F.C.C.2d 725, 31 Fed. Reg. 4540 (1966). The rules provided, inter alia, that (1) CATV systems must carry the signals of local and nearby stations, (2) CATV systems cannot carry on the same day a signal which duplicates a program of a local station, and (3) Commission approval is required for a CATV system to carry a signal beyond its Grade B contour.[1]

In addition to the foregoing rules, the Commission adopted Rule 74.1109 (47 C.F.R. § 74.1109), which provides that on petition by a CATV system, television station or other interested person the Commission may waive any of its rules or impose additional requirements. Rule 74.1109(f) provides in part:

> "In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief."

On March 17, 1966, Midwest Television, Inc., a licensee of a San Diego VHF station (and herein an intervenor), petitioned under Rule 74.1109(f) for temporary relief pending a hearing on the effects of CATV on the television stations in San Diego. On July 25, 1966, the Commission, in the order under review here, granted Midwest the temporary relief it sought by limiting the CATV systems, petitioners here, to (1) delivering Los Angeles

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[1]Grade B is one of a trio of ratings according to the strength of a signal. The grades are defined in terms of the level of signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade—90%; Grade A—70%; Grade B—50%.

The signal, of course, is strongest nearer the point of origination, and becomes progressively weaker as it is removed further from the point of origination. Intervening obstacles such as mountains or other high elevations, poor ground conductivity, or seasonal and other changes in atmospheric conditions can often impair or make impossible good television reception. That area where the signal reception is Grade B is described as being within the Grade B contour. CATV systems, of course, build their antennae in Principal City areas and then carry the signals into the Grade B contour and beyond.

signals to subscribers in the area which they served on February 15, 1966; (2) adding subscribers in other areas, but to them carrying only San Diego-Tijuana signals; and (3) continuing to provide the service they had been providing prior to the date of the order.

Petitioners sought review by this court of the July 25, 1966 order, and asked for a stay of the Commission's order. After argument we issued an interlocutory injunction against enforcement of the order as it prevents the addition of new subscribers to the trunk and feeder lines in existence on August 23, 1966.

Petitioners have specified many grounds for setting aside the Commission's order, some of constitutional dimension. Initially we must consider the assertion that the Commission did not have the power to issue the order in question. We agree with the petitioners that the Commission was without power to act as it did.[2]

The order issued by the Commission was prohibitory in nature. Though petitioners contend that it was in truth a cease and desist order, the Commission has expressly denied that it is such an order and disclaimed the authority of 47 U.S.C. § 312 which authorizes such orders. The Commission tells us that its only

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[2]After this case was heard, the Commission issued its Memorandum Opinion and Order, disposing of various petitions which had been filed, largely by cable-television owners and operators, seeking reconsideration of the Commission's Second Report and Order (2 F.C.C.2d 725) which had adopted rules with respect to CATV. Memorandum Opinion and Order, ... F.C.C.2d ..... (released January 19, 1967). Of the seven Commissioners, one did not participate, one was absent and two dissented. See particularly the dissenting opinion of Commissioner Loevinger, wherein he states, among other things:

> ". . . [I]t is by no means clear that there is a majority of the Commission in support of the jurisdiction that is in fact being exercised; . . . .
>
> "If such reasons [as given in the majority opinion] are adequate to support jurisdiction, then there is no limit to the authority of this Commission.
>
> "I do not believe that Congress even intended to grant or will in the future ever act to grant such a vague and limitless jurisdiction as the Commission now asserts and exercises. . . . [T]here is a strong . . . reason for insisting that the broad power of regulation should be confined within the jurisdiction specified by Congress in statutes, ..."

sources of authority for the order in issue are section 4(i) of the Act[3] and section 303(r) of the Act.[4]

> "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).
>
> ". . . [T]he Commission . . . shall—
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." 47 U.S.C. § 303(r).

These provisions are general, couched in broad and indefinite terms.[5] There is no doubt that Congress intended by these provisions to provide the Commission with a degree of flexibility in performing its important tasks. Such provisions, however, by their own terms, are to be measured by the Act and its structure and purpose.

The method of regulation of broadcasting chosen by Congress was licensing. The Commission was created and charged with supervising the licensing function, to the end of promoting the development of the best radio (and later television) service in the public interest. To fulfill its duties the Commission was given two

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[3] 47 U.S.C. § 154(i). References to the Act or to sections are to the Communications Act of 1934, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.), unless otherwise indicated.

[4] 47 U.S.C. § 303(r).

[5] We note in passing the placement of these provisions within the structure of the Act. Section 154(i) is preceded by a provision defining a quorum and authorizing judicial notice of the Commission's seal (47 U.S.C. § 154(h)), and followed by one regarding the conduct of proceedings (47 U.S.C. § 154(j)).

Section 303(r) is preceded by a provision authorizing the Commission to require painting or illuminating of radio towers (47 U.S.C. § 303(q)), and followed by one authorizing the Commission to require all television receivers to be able to receive all frequencies.

weapons under section 312, revocation of the license and (since 1952) the cease and desist order. Restricting these powers, however, Congress specified certain procedural safeguards, 47 U.S.C. § 312(c), (d) and (e).

We are fully aware of the authorities which have sustained grants of power to agencies and interpreted such powers so as to give those agencies a high degree of flexibility. In *Clear Channel Broadcasting Service v. United States,* 284 F.2d 222 (D.C. Cir. 1960), the FCC's powers, specifically including section 303(r), were described as "broad" in reference to an order regarding skywave interference. In *Public Service Comm'n v. FPC,* 327 F.2d 893 (D.C. Cir. 1964), the District of Columbia Circuit discussed the powers of the Federal Power Commission with language which we feel is equally applicable to the authority of the FCC.

> "All authority of the Commission need not be found in explicit language. . . , While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail." 327 F.2d at 897.

We cannot, however, extend this language to include the power claimed by the Commission in the case at bar. We note some of the cases in which the Commission's authority has been sustained. *Bendix Aviation Corp. v. FCC,* 272 F.2d 533 (D.C. Cir. 1959), *cert. denied,* 361 U.S. 965 (1960), concerned an application by Bendix for authority to use the 430 Mc radio frequency in developing an aircraft collision prevention system. Prior to the application, frequencies in the 420-450 Mc band had been reserved exclusively for government use. The court sustained denial of the application without a hearing. The denial of the authority Bendix sought, which would have been a license, was challenged procedurally in that it had been denied without a hearing. Although the court cites section 4(i) and 303(r) of the Act, both of which are set out above, there appears to have been no real challenge to the Commission's power to deny the license, so that the authority for the court's decision is that cited as section 4(j) of the Act (47 U.S.C. § 154(j)), providing for procedural flexibility. *Cf. FCC v. Schreiber,* 381 U.S. 279 (1965).

Mesa Microwave, Inc. v. FCC, 262 F.2d 723 (D.C. Cir. 1958), is a case dealing with CATV problems. Mesa used microwave to

carry signals and therefore needed a license. It filed an application, but no action was taken as the Commission had "frozen" all applications pending an inquiry. The petition for a writ of mandamus was denied because the delay had not been so great (about six months) as to warrant the extraordinary remedy of mandamus. Later, in *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963), the court described the action in *Mesa* as declining to upset a "freeze" on the processing of license applications. In *Kessler* the District of Columbia Circuit affirmed the "freeze" order as it halted the acceptance of applications for certain radio licenses. The basis of the decision was that the "freeze" order was procedural, and the later denial of the applications without a hearing was permissible. The unstated authority is probably section 4(j) of the Act, as in *Bendix, supra*.

The decisions examined above deal either with the licensing authority of the Commission or procedural questions related to licensing proceedings.[6] Petitioners in the case at bar point out that they have not sought a license from the Commission, nor are they required to do so.

Our resolution of the present case is guided by the language of the Supreme Court in *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586 (1950). In that case the FCC granted a license on the condition that the station repudiate its contract with certain persons, which contract, it was found by the Commission, endangered the financial ability of the station. After repudiation, a state court entered judgment for breach of contract against the station. The contention was raised that by its order the FCC had invalidated the contract. The Supreme Court noted the scope of the agency power:

> "As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress. . . . These cases [*FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)] make clear that the Commission's

[6]The Commission's primary authority is such a case. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), dealt with the Commission's rule that it would not issue a license if the applicant already operated five television stations. Storer, owning five, objected that its application for a sixth was denied without a hearing.

regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions." 338 U.S. at 597-99 (footnotes omitted).

Dealing specifically with one of the provisions in issue here, to wit, the powers under section 303(r) of the Act, the Court said:

> "One suggestion is that petitioner's position has a specific statutory basis [for invalidating the contract] in § 303(r), which permits the Commission to prescribe such 'conditions' as are 'necessary to carry out the provisions' of the Act. We do not think the suggestion is sound. Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power. *It is in connection with this power that § 303(r) is to be interpreted.*" 338 U.S. at 600 (emphasis added).

In *Carroll* the Court recognized the Commission's embarrassing lack of ability to issue cease and desist orders together with its attempts to remedy the situation. The Court noted that the Commission had requested the power from Congress, "but, so far as we are aware, the Commission request did not go beyond asking for power to issue a cease and desist order *against a licensee.*" 338 U.S. at 602 (emphasis added). The Court had reference to S. 1333, 80th Cong., 1st Sess. (1947), which was one of the predecessors to the Communications Act Amendments, 1952, 66 Stat. 711 (1952). It was the 1952 amendments which enacted the cease and desist authority of section 312 of the Act.[7] We point this out to show that in 1950, when *Carroll* was decided and sections 4(i) and 303(r) were exactly as they are today, the power the Commission possessed was exercisable only against licensees or applicants. Put another way, sections 4(i) and 303(r) did not, in 1950, authorize action against a nonlicensee.

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[7]The direction of the Commission's powers was apparently understood by Congress to be limited to licensees when it considered the 1952 amendments to the Act. "It is believed that the authority to issue cease and desist orders will give the Commission a means by which it can secure compliance with the law and regulations *by licensees.*" Conf. Rept. No. 2426, 1952 U.S. Code, Cong. & Ad. News 2234 (emphasis added).

The Supreme Court again analyzed the limits of the Commission's power in *FCC v. American Broadcasting Co.*, 347 U.S. 294 (1954). In that case the Commission had issued rules against "give-away" programs. The Court was concerned with the relationship between the Commission's action and the criminal sanctions against broadcasting lottery information, 18 U.S.C. § 1304.

> "Like the court below, we have no doubt that the Commission, concurrently with the Department of Justice, has power to enforce § 1304. Indeed, the Commission would be remiss in its duties if it failed, *in the exercise of its licensing authority*, to aid in implementing the statute, either by general rule or by individual decisions.[7] But the Commission's power in this respect is limited by the scope of the statute. Unless the 'give-away' programs involved here are illegal under [18 U.S.C.] § 1304, the Commission cannot employ the statute [the Communications Act] to make them so by agency action." 347 U.S. at 289-90 (emphasis added).

The Court's footnote specifically notes sections 4(i) and 303(r). In view of the emphasized portion of *American Broadcasting* and the specific language of *Carroll*, we reach the conclusion that sections 4(i) and 303(r) are limited to the scope of the Commission's licensing authority. *Cf. Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 433-34 (1963) (Brennan, J., concurring).

The logic of our conclusion seems to us inescapable. If the authority of sections 4(i) and 303(r) were as broad and extensive as the Commission urges, the authority of section 312 to issue cease and desist orders would be meaningless or repetitive. There is nothing to indicate that if the Commission is empowered to issue an order like that under review it cannot similarly issue a cease and desist order without the safeguards of section 312. *Cf. United States v. National Plastikwear Fashions, Inc.*, 123 F.Supp. 791 (S.D. N.Y. 1954). We must assume that when Congress in 1952 gave the Commission the power to issue cease and desist orders it was not duplicating an already existing power.

Our conclusion that the Commission lacked the power to issue the order in question requires that the order be vacated and set aside. In light of our disposition of the case, we decline to express any opinion as to the other issues raised in this proceeding.

The Memorandum Opinion and Order of July 25, 1966, is VACATED and SET ASIDE to the extent that it limits the operations of the petitioners as set forth in paragraphs 24-26 of that order.

ELY, Circuit Judge (Concurring):

I endorse the carefully researched opinion of my Brother Barnes, and I concur in its conclusions. I think it appropriate, however, to emphasize the basic justice of our decision.

As Judge Barnes relates, the Commission had, prior to the commencement of petitioners' activities, disavowed its power to regulate such activities.[1] It is not unreasonable to assume that the petitioners considered this history in making their determinations to embark upon their ventures. They then undertook their lawful pursuits, investing substantial sums of money and, incidentally, proceeding under the auspices of the responsible San Diego officials who issued the required municipal permits. Not until petitioners had incurred the expense of installing necessary and fixed facilities and had acquired subscribing customers did the Commission presume to issue the order which, if enforceable, would adversely affect, if not destroy, the petitioners' investments.

In the light of the only conferred powers under which its authority exists, reviewed by my Brother Barnes, and in the light of all the circumstances, some of which I have briefly stated, I believe that the Commission trespassed upon constitutional safeguards against the confiscation of property.[2]

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[1]It had unsuccessfully sought legislation which would have specifically given it the jurisdiction which it now claims to have always had S. 2653, 86th Cong., 1st Sess. (1960).

[2]Compare *California Citizens Band Association, Inc. v. United States*, ... F.2d ..... (9th Cir. 1967), wherein we very recently held that the Commission was fully empowered to adopt reasonable regulations affecting licensees whose operations clearly fell within the Commission's jurisdictional powers of supervision and regulation.

In the United States Court of Appeals for the Ninth Circuit

No. 21183

SOUTHWESTERN CABLE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS; JACK O. GROSS, ET AL., INTERVENORS

No. 21192

MISSION CABLE TV, INC., PACIFIC VIDEO CABLE COMPANY AND TRANS-VIDEO CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS; JACK O. GROSS, ET AL., INTERVENORS

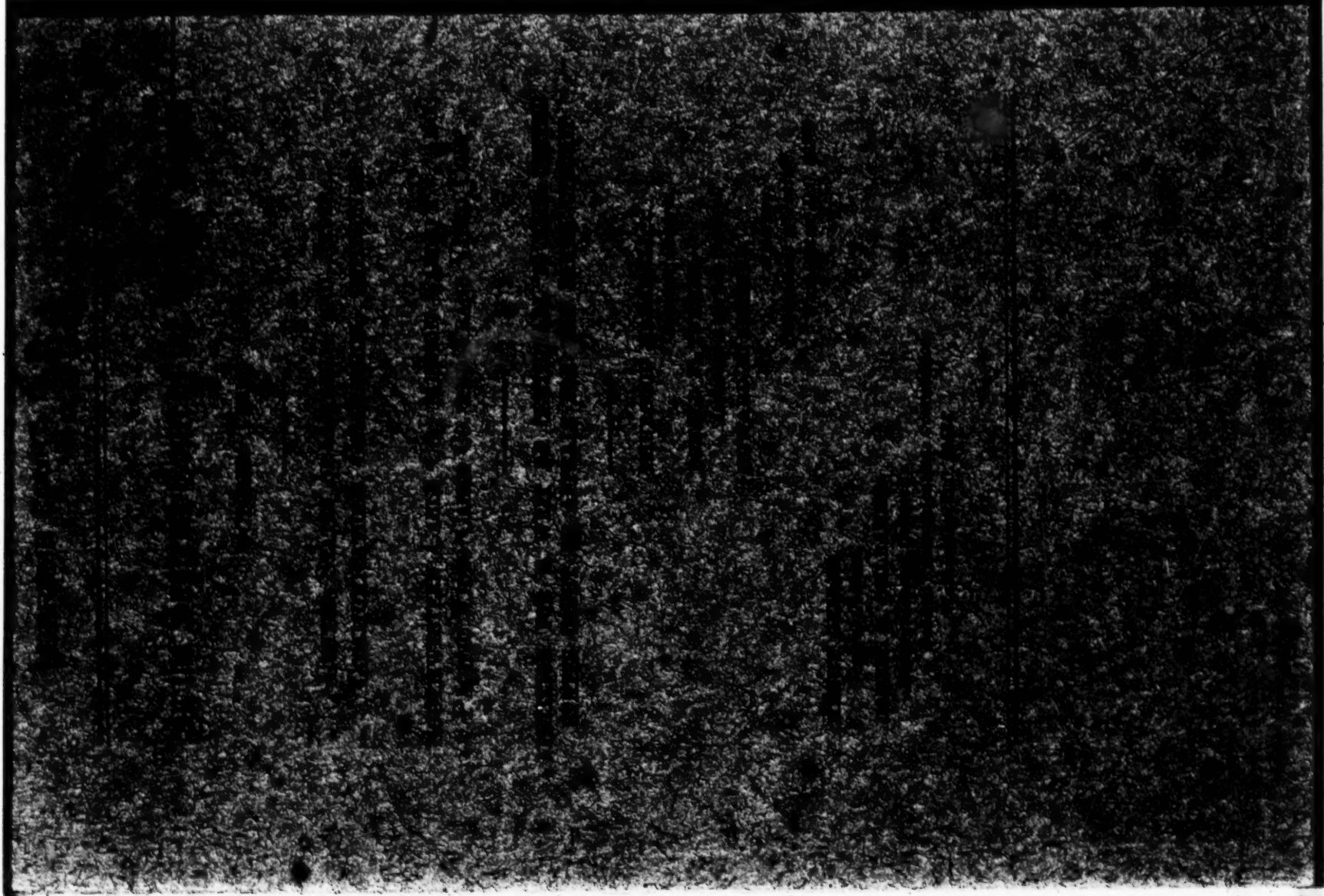
Before BARNES and ELY, Circuit Judges, and PECKHAM, District Judge.

DECREE

These causes came on to be heard upon the petitions of Southwest Cable Company and Mission Cable TV, Inc., Pacific Video Cable Company and Trans-Video Corporation, to review a memorandum opinion and order of the Federal Communications Commission issued by it on July 25, 1966, with an erratum issued on July 26, 1966.

The court heard argument of respective counsel on January 10, 1967, and has considered the briefs and transcript of record filed in these causes. On April 28, 1967, the court being fully advised in the premises handed down its opinion in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED. by the United States Court of Appeals for the Ninth Circuit that the memorandum opinion and order of July 25, 1966, of the said Federal Communications Commission is vacated and set aside to the extent that it limits the operations of the petitioners as set forth in paragraphs 24–26 of that order.



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In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 28, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 21–30) is unreported. The Commission's memorandum opinion and order (App. C, *infra*, pp. 33–65) is reported at 4 F.C.C. 2d 612.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 31–32) was entered on April 28, 1967. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has jurisdiction to regulate non-microwave community antenna television (CATV) systems.

2. Assuming an affirmative answer to the first question, whether in the exercise of such jurisdiction the Commission has power to issue an interim order maintaining the status quo pending a hearing to determine the economic impact on local free television of distribution by a CATV system of television signals from other areas of the country.

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(e), 4(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, 152(a), 153(a), 153(e), 154(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b) are set forth in Appendix E, *infra*, pp. ~~80-84~~ 81-85.

STATEMENT

This case arises out of an order of the Federal Communications Commission requiring respondents, operators of three community antenna television (CATV) systems in San Diego, California, to limit the growth of their systems while the Commission conducted a hearing to determine whether their further expansion would have an adverse economic effect on free television service in San Diego. The Commission acted under a comprehensive set of rules it

adopted to regulate the use of television broadcast signals by CATV systems while it explores the economic effect of CATV on free television in major markets. *Second Report and Order,* 2 F.C.C. 2d 725 (R. 49).[1] In a decision casting serious doubt on the Commission's authority over CATV generally, the Ninth Circuit held that the Commission lacks the statutory authority to issue such interim orders.

A. BACKGROUND

A CATV system picks up television signals by means of high antennae located at a point of good reception, amplifies them and carries them into a community by means of cable or microwave transmission, and then distributes them by cable to the homes of individual subscribers who pay a monthly fee and, commonly, an initial installation charge.[2] In most

[1] "R." refers to respondents' Appendix in the court of appeals, ten copies of which have been lodged with the Clerk of the Court.

[2] The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such terms shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." 47 C.F.R. 74.1101(a), 2 F.C.C. 2d at 801 (R. 125).

communities the systems are locally franchised.[3] CATV originated to bring television to communities not being served because of remoteness or terrain, and to offer multiple television service to areas not enjoying it. Early CATV systems customarily offered three channels, but newer systems generally have a twelve-channel capacity, and twenty-channel systems are being projected for the future. Some systems now distribute signals hundreds of miles from their points of origin. Latest estimates place the number of systems in operation at over 1,800, with some 1,600 systems franchised but not yet in operation, and over 2,400 applications pending in 1,200 cities. While franchises were initially obtained only in underserved communities of small or modest size, CATV franchises are now being sought or have already been obtained in the largest cities. *Second Report and Order,* Par. 117, 2 F.C.C. 2d at 771–772 (R. 95).

This rapid development directly affected the allocation of television service established by the Commission in carrying out its responsibility to license use of the radio band and to fix the zones to be served by stations. 47 U.S.C. 303(h), 307(b). In a comprehensive rule-making proceeding, (*Second Report and Order,* 2 F.C.C. 2d 725 (R. 49)) the Commission Concluded that it has jurisdiction over CATV.[4] It found

[3] The distribution cable facilities are usually located on electric power or telephone utility poles, and easements and rights-of-way to use streets and alleys are often obtained from the governing bodies of the municipalities involved. A percentage fee is frequently paid to such municipalities for CATV franchises.

[4] The Commission first asserted jurisdiction over CATV systems using microwave transmission—which requires a license. *First Report and Order,* 38 F.C.C. 683. On April 23, 1965, the

that importation by CATV of multiple signals into a community may have a severe economic impact upon local stations offering free television service, particularly small, independent stations operating in the UHF band.[5] Its report noted that CATV's offer to the viewer of a choice of multiple programming derived from distant signals could fragment a local station's audience, impairing its ability to earn advertising revenues and thus threatening its ability to serve the local community. Moreover, CATV cannot economically extend its lines to rural areas; it does not serve those who cannot afford its monthly fees and installation charges; and it does not offer a forum for the expression of views on matters of local interest. By potential-

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Commission issued a Notice of Inquiry and Notice of Proposed Rule Making in which it tentatively concluded that it had jurisdiction over all CATV systems, whether they use licensed microwave or only cable. 1 F.C.C. 2d 453 (R. 4–46). After receiving voluminous comments, it released its *Second Report and Order*, on March 8, 1966. A few State public utilities commissions have been given or have determined that they have jurisdiction over some of the intrastate aspects of CATV. Generally, however, until the Commission acted in 1966, CATV systems were, as a general matter, substantially unregulated.

[5] In the larger markets, UHF (ultra high frequency—channels 14–83) stations typically offer non-network commercial or educational programming but serve much smaller audiences than VHF (very high frequency—channels 2–13) stations. Many home sets are not equipped to receive UHF and it is somewhat harder to focus. In order to promote the development of multiple television service through local UHF stations, Congress in 1962 passed all-channel receiver legislation. 76 Stat. 150, 47 U.S.C. 303(s). See H. Rep. No. 1559, 87th Cong., 2d Sess., 2–6; S. Rep. No. 1526, 87th Cong., 2d Sess., 2–5. This statute authorized the Commission to require that all television receivers sold in interstate commerce be equipped to receive UHF signals, and the Commission promptly acted under that authorization.

ly impairing the viability of free local broadcasting in a community, CATV might reduce or deny service to many viewers.

Information available, however, did not permit the Commission to adopt general rules permanently regulating the growth of CATV as a part of the nation's television system. The Commission concluded that it would not be in the public interest for CATV to become entrenched in the larger television markets while its effect on the survival of broadcasting in the communities involved was uncertain. It therefore proposed to examine the effect of CATV on a case-by-case basis. While establishing some general rules (see note 8, *infra*), the Commission nevertheless stated (Par. 121, 2 F.C.C. 2d at 773, R. 97): "The plain fact is that on the record before us, it is not possible to give a definitive answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets," and concluded (Par. 126, 2 F.C.C. 2d at 776, R. 100):

> * * * We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."

Specifically, the Commission determined that there

should be full exploration, in an evidentiary hearing, of the impact of any new proposed CATV system bringing signals from beyond the Grade B contour of the originating station into the Grade A service area of any station in a community in one of the largest one hundred television markets.[6] Section 74.1107 of the rules (App. F, *infra*, pp. ~~85–87~~ 87–89) was adopted to effectuate this determination. That regulation requires a hearing before a CATV system may bring a distant signal into any community within the Grade A service area of a television station in one of the top 100 markets. A grandfather provision in the rule (Section 74.1107(d)) stipulates that this general requirement does not apply to any signal which was being supplied by a CATV system to its subscribers on or before February 15, 1966.[7] There is, however, a proviso to the effect that, whatever the scope of its existing franchise, a grandfathered system shall not extend its service into "new geographical areas" if the Commission finds, upon petition filed by a television broadcast station or other interested person in the area, that such extension of service is contrary to the public

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[6] A station's Grade B contour is the imaginary line upon which a good picture may be expected 90 percent of the time at the best 50 percent of the locations. The Grade A contour defines the area at the perimeter of which a good picture is received 90 percent of the time at the best 70 percent of the locations. See *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, 515–516 n. 12 (C.A.D.C.).

[7] On February 15, 1966, the Commission had released a Public Notice in which it announced that new rules would shortly be adopted to apply to non-microwave CATV systems, as well as those using microwave, and announcing that February 15 would be the "grandfathering" date.

interest. The proviso also authorizes temporary relief pending a hearing (App. F, *infra*, p. 87):

> The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

Finally, recognizing that in this new and rapidly developing field it could not deal in advance with every potential area of concern, the Commission, in Section 74.1109 (App. F, *infra*, pp. 87-89), made provision for special situations which would justify relief from the requirements of the rules or which would require imposition of "additional or different requirements" on an *ad hoc* basis. Here again, temporary relief pending hearings was authorized. One relatively rare situation identified by the Commission as appropriate for such individualized consideration is that in which two major markets are so located that the Grade B contour of a station in one overlaps that of one or more in the other (*e.g.*, Washington and Baltimore.)[8] 2 F.C.C. 2d at 786, n. 69 (R. 110).

B. THE PRESENT CASE

Respondents operate three CATV systems in San Diego, California, the 54th largest television market

[8] In addition to the rules discussed above, the Commission also adopted rules which require CATV systems (1) to carry local stations, and (2) to refrain from duplicating locally broadcast programs by bringing in on the same day distant signals carrying the same program. These provisions are not involved here.

in the United States. They have grandfather rights under the Commission's rules and presently carry between six and eight Los Angeles television stations into various sections of San Diego. Local broadcast service now operating in San Diego consists of two VHF television stations (KFMB–TV, (CBS) and KOGO–TV (NBC)) and one UHF station (KAAR).[9] Midwest Television, Inc., licensee for KFMB–TV, filed a petition with the Commission under Section 74.1107 (d) of the rules alleging that respondents were expanding rapidly into new geographical areas, that the viability of local broadcasting was being threatened, and that this expansion should be limited. Respondents claimed that they were not extending Los Angeles signals in violation of Section 74.1107 because San Diego is within the Los Angeles stations' Grade B contour and that in any event respondents' grandfather rights permitted them to expand. Without deciding the Grade B contour issue, the Commission held that this case might be one requiring the imposition of "additional or different requirements" under Section 74.1109. It therefore set the matter down for hearing under that rule. To avoid entrenchment of the systems and possible disruption of service to subscribers in the new geographical areas in question, the Commission provided (in Pars. 24–26 of its decision) for an interim order limiting expansion of the systems during the pendency of the hearing. Respondents could continue

[9] The Commission has issued a construction permit for another UHF station and an application is pending for a noncommercial UHF educational station. The area is also served with ABC network programs by a VHF station in Tijuana, Mexico.

full service to all current subscribers and were permitted to extend their lines, but they were barred from carrying Los Angeles signals into new geographical areas. *Memorandum Opinion and Order,* July 25, 1966, 4 F.C.C. 2d 612 (App. C, *infra,* pp. 56–58).

Respondents petitioned the court of appeals for review of the interim restriction, contending that temporary relief of this kind is not authorized by the Communications Act.[10] The court of appeals set aside the Commission's order insofar as it granted interim relief, expressly stating that it was not deciding any of the other questions presented (App. A, *infra,* p. 29). More broadly, however, it held that the order was not justified by the Commission's general rule-making authority under Sections 4(i) and 303(r) of the Communications Act (47 U.S.C. 154(i) and 303(r)) because these provisions "are to be measured by the Act and its structure and purpose" (App. A, *infra,* p. 25). Citing *Regents* v. *Carroll,* 338 U.S. 586, the court below ruled that the Commission's powers with respect to the regulation of broadcasting are limited to the licensing of stations and related functions, explicitly stating that "sections 4(i) and 303(r) are limited to the scope of the Commission's licensing authority" (App. A, *infra,* p. 29). Since non-microwave CATV systems are not licensed activities, the Commission, in the court's view, lacked authority to prevent respondents from expanding pending the hearing it had ordered.

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[10] In addition, respondents Trans-Video, Mission and Pacific urged, *inter alia,* that the Commission lacked jurisdiction to regulate CATV systems; that its regulations violated the First Amendment; and that the rule invoked by the Commission was invalid because it was adopted without adequate notice.

REASONS FOR GRANTING THE WRIT

Although the court of appeals set aside only that part of the Commission's order which directed maintenance of the status quo pending a hearing, it did so on grounds which cast serious doubt on the Commission's jurisdiction to regulate any aspect of non-microwave CATV. In view of CATV's burgeoning growth, the court's holding that the Commission's authority in the broadcast area is limited to the regulation of radio and television licensees presents a question of far-reaching legal and practical importance.

The court's decision unduly restricts the Commission's ability to carry out its congressionally prescribed function under the Communications Act. It is, moreover, in direct conflict with a decision of the Court of Appeals for the District of Columbia Circuit holding that the Commission has jurisdiction over non-microwave CATV. *Buckeye Cablevision, Inc.* v. *Federal Communications Commission,* C.A.D.C. No. 20274, decided June 30, 1967 (App. D, *infra,* pp. 66-70).

Effective administration of the Communications Act also requires resolution of the subsidiary question whether the Commission has power to maintain the status quo in a particular market by an interim order while it explores the economic impact of CATV in that area. Such ancillary authority is essential to the effective and meaningful exercise of the Commission's jurisdiction over CATV and is, we believe, fully consistent with the statutory scheme.

1. The Commission's jurisdiction to regulate CATV is based upon the language, structure and purpose of the Communications Act, 47 U.S.C. 151 *et seq.* As reflected in the Commission's comprehensive discus-

sion of its jurisdiction in the *Second Report and Order,* 2 F.C.C. 2d 725, 728–734, 793–797 (R. 52–58, 117–121), it does not claim licensing authority over non-microwave CATV. But the scope of the Commission's regulatory authority under the Communications Act is not confined solely to certificated common carriers and broadcast licensees.[11] It extends "to *all* interstate and foreign communication by wire * * * and to all persons engaged within the United States in such communication," 47 U.S.C. 152(a) (emphasis added). Community antenna systems come squarely within this definition: wire communication within the meaning of the Act (47 U.S.C. 153(a)) is plainly involved, and extension of the transmissions of television stations is in interstate commerce whether or not the extension itself occurs entirely within one state. *Idaho Microwave, Inc.* v. *Federal Communications Commission,* 352 F. 2d 729 (C.A.D.C.). Cf. *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Co.,* 289 U.S. 266; *Fisher's Blend Station, Inc.* v. *State Tax Commission,* 297 U.S. 650.

Because CATV intercepts and extends television signals it bears a uniquely close relationship to the Commission's responsibility for providing, through licensing use of the radio band, a fair and equitable allocation of radio service across the country (47 U.S.C. 307(b)); and to the Commission's authority to establish the area or zone to be served by each station (47 U.S.C. 303(h)). In view of the grave economic

[11] Cf. *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission,* 359 F. 2d 282 (C.A.D.C.), which held that the Commission was not required to regulate CATV systems as common carriers.

impact which, the Commission found, CATV may in some circumstances have on the viability of licensed broadcasting in a community, and the fact that CATV is wire communication subject to the Act, there is ample authority for the Commission to use its general rule-making powers under Sections 4(i) and 303(r) (47 U.S.C. 154(i) and 303(r)) to prevent frustration of the legislative purpose to achieve a fair and equitable allocation of television service.

The scheme of regulation created by the Act is designed to meet new developments in the continuously evolving uses of radio and television. Both with respect to technological and economic regulation the Commission is given flexible, comprehensive and expansive powers "to promote and realize the vast potentialities of radio. * * *" *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217; see *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203. Thus, with respect to the Commission's rule-making powers, Section 4(i) contains a broad grant of authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Section 303(r) similarly grants authority "[e]xcept as otherwise provided in this Act * * * from time to time, as public convenience, interest, or necessity requires * * *" to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *." These are not merely housekeeping provisions, but constitute affirmative grants of power, *United States* v. *Storer Broadcasting Co., supra*, at 202–203, "coterminous with the scope of

agency regulation," *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 309–311.

All of this was plainly recognized in *Buckeye Cablevision, Inc.* v. *Federal Communications Commission, supra,* which decision squarely conflicts with the decision below. In *Buckeye,* the Commission issued a cease-and-desist order to compel a CATV system in Toledo, Ohio, to obey the distant signal rules. On petition for review the Court of Appeals for the District of Columbia Circuit held that the Commission has ample power to issue and enforce such rules, and that in doing so it had "chosen an eminently reasonable course. The growth of CATV is so rapid that, if it is allowed to proceed unabated, harm to the regulatory scheme can occur before the Federal Communications Commission can act" (App. D, *infra,* p. 71).

Whatever the merits of the particular rules adopted—a question not presented by this case—we think it clear that the Commission has authority to regulate CATV operations. The restrictive approach adopted by the court below—that the Commission's rule-making powers under Sections 4(i) and 303(r) are limited to broadcast licensees—would defeat the comprehensive purposes of the Act to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)), and "to secure the maximum benefits of radio to all the people of the United States. * * *" *National Broadcasting Co.* v. *United States, supra,* at 217. As *Buckeye* makes clear, the Commission's powers are not "rigidly compartmentalized into 'licensing' and 'public utility regulation' functions" (App. D, *infra,* p. 73, n. 19). See

Carter Mountain Transmission Corp. v. *Federal Communications Commission,* 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951. Those powers extend, and must necessarily extend, if the Commission is to regulate effectively, to all conduct by persons subject to the Act which, as in the case of CATV, directly relates to and affects broadcasting.

Regents v. *Carroll,* 338 U.S. 586, does not support the restrictive reading of the Act adopted below. In that case a station whose license had been renewed by the Commission on condition that it repudiate a contract that had effected an improper delegation of control, was ordered by a State court to make a payment under the contract. This Court held that the station's defense of impossibility, based on the condition in its license, was a matter of State law. The Court noted that the Commission's remedial powers under the Act as it then stood were centered around its licensing functions. But the *Regents* holding does not in any event "bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme." *Buckeye Cablevision, Inc.* v. *Federal Communications Commission, supra* (App. D, *infra,* p. 73).

The decision below has cast an ominous cloud over the Commission's entire CATV regulatory program.[12]

[12] After the decision of the court below, respondents moved to terminate the Commission's hearing on the ground that under the court of appeals' decision the Commission is barred from imposing any restriction or limitation on the operations of their CATV systems. The Commission denied the petition on the ground that, whatever the rationale of the decision and the

At present, the Commission is engaged in literally hundreds of proceedings to apply its rules, grant waivers or impose special requirements.[13] Moreover, approximately 23 cases involving the CATV rules are pending in the courts of appeals; 11 of these challenge the Commission's jurisdiction over CATV (App. G, *infra*, pp. ~~90-92~~ 93-95). Resolution of the jurisdictional question by this Court will dispose of a mass of judicial and administrative litigation and settle an issue of great public importance.

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language of the opinion, the court's *judgment* was in terms limited to the power to issue interim orders. Since disagreeing with the court's decision and then in the process of preparing to seek review in this Court, the Commission focused on the judgment, instead of the rationale and opinion, of the court below in denying the petition. That the Commission so proceeded does not mean that it is committed to a narrow view of that decision, nor that it impaired its ability to seek review of the broad rationale on which that decision was grounded.

The Ninth Circuit has recently indicated a broad reading of its decision here by citing the instant case as sole authority in staying a cease-and-desist order against violation of the CATV rules. *Valley Vision, Inc.* v. *United States*, C.A. 9, Nos. 21869 and 21870 (order of June 29, 1967). Since no interim order was there involved and the Commission has express authority to issue cease-and-desist orders (47 U.S.C. 312(b)), it is apparent the court believes that the Commission has no jurisdiction over non-microwave CATV. Similar attacks on the Commission's jurisdiction, based on the decision below, have been filed in many other pending Commission proceedings.

[13] As of June 15, 1967, approximately 272 pleadings have been filed under the Commission's distant-signal rules (Section 74.1107) requesting hearings or waivers. The Commission has disposed of 90 and 182 are pending. Under the Commission's "additional or different requirements rule" (Section 74.1109), approximately 390 proceedings have been filed. The Commission has disposed of 150 (including 26 cease-and-desist proceedings) and 234 are pending.

2. If the Commission has jurisdiction to regulate CATV systems, that power must encompass all that is necessary to prevent frustration of the Act's purposes. *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 311. The power to issue interim orders to maintain the status quo while the Commission investigates the impact of CATV in particular markets is not merely useful; it is indispensable to the Commission's effective performance of its statutory responsibilities.

CATV presents novel problems; neither the Commission nor the industry has yet been able to fully assess the impact which this new development may have on broadcasting. The thrust of the Commission's rules, therefore, is not to prevent the development of CATV but to permit the examination, on an *ad hoc* basis, of its effect on particular markets and on the Commission's allocation of television service throughout the country. It seems plain that "* * * this kind of flexibility and adaptability to changing needs and patterns * * * is an essential part of the office of a regulatory agency." *American Trucking Ass'ns* v. *Atchison, T. & S.F. R. Co.*, Nos. 57, 59, 60, 1966 Term, decided May 29, 1967 (slip op., p. 18). But such an examination could be completely frustrated if CATV systems were to mushroom in the very markets under study while the Commission was proceeding to ascertain the facts and make informed determinations. Unless the status quo is maintained in the interim, the Commission's investigation may be mooted by a *fait accompli*.[14] As the Com-

[14] If the Commission lacks power to maintain the status quo in aid of its jurisdiction over CATV pending a hearing, its only recourse, should it eventually determine that expansion should not, in the public interest, be permitted, would be the quite unde-

mission stated (*Second Report and Order*, Par. 140, 2 F.C.C. 2d at 781–782, R. 105–106):

> It is important, we think, to exercise [our] jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consistent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest.

The same considerations apply whether the status quo is to be maintained by a general rule (as in Section 74.1107) restricting new franchises in the top 100 markets pending a hearing, or by *ad hoc* rulings tailored under Rule 74.1109 to the facts of the particular case, as here. This is precisely the kind of situation in which the Commission may proceed either by a general rule or by particular order. Compare *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202, with *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205; cf. *Logansport Broadcdsting Corp.* v. *United States*, 210 F. 2d 24, 27 (C.A.D.C.). Indeed, there can hardly be complaint because here the status quo is maintained, not automatically, by operation of law, but, rather, by special order, entered after notice and upon consideration of the particular circumstances. Stated differently, in the kind of situation here involved the Commission has

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sirable and rather infeasible one of requiring removal of already installed systems.

determined to proceed on an *ad hoc* basis rather than to prescribe by general rule a requirement for a hearing in each and every case. That it could have done so, assuming jurisdiction over CATV generally, seems clear. That it chose rather to adopt a more flexible procedure, and place the burden on interested persons who fear adverse effects from expansion of existing systems to seek the initiation of an inquiry, seems an eminently reasonable course for the Commission to follow in regard to an overlapping Grade B contour sort of situation.[15]

Indeed, the instant case is quite similar to *R. A. Holman & Co., Inc.* v. *Securities and Exchange Commission*, 299 F. 2d 127 (C.A.D.C.), certiorari denied, 370 U.S. 911. There interim action by the SEC suspending a broker's right to deal in exempt securities pending a hearing was sustained under that agency's general regulatory powers. The court noted (299 F. 2d at 131):

> In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance,

[15] Section 312 of the Act, 47 U.S.C. 312, which provides for permanent cease-and-desist orders for violation of the Communications Act or the Commission's rules, is not germane. The court below inferred from the existence of Section 312 that the Commission lacked power to enter an interim order of the kind involved here. Section 312, however, authorizes a sanction, not a device for stabilizing a rapidly changing situation in abeyance while the Commission studies its impact. Here we are dealing with a temporary stay, not a permanent ruling as under Section 312. That critical distinction makes the court below's reliance on Section 312, as a basis for concluding that the Commission lacks the power to issue interim orders, misplaced.

> an official body can take summary action pending a later hearing. * * *

Of course, as *Holman* indicates, the validity of an interim order depends upon a reasonable balancing of public and private interests. Here the Commission found temporary relief to be necessary to prevent consequences potentially adverse to the public resulting from the unfettered growth of respondents' systems while a hearing was in process. Such a determination is one that the Commission is empowered by statute to make, and one which the Commission needs to be able to make in order to carry out the regulatory authority given it by Congress.[16] In concluding that the Commission lacked the authority to enter interim orders to maintain the status quo pending a hearing, and in

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[16] In this case, the Commission also considered whether it would be appropriate for it to seek an injunction from the court of appeals to preserve its jurisdiction to enter an effective order after hearing, under *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. 4 F.C.C. 2d at 622, App. C, *infra*, pp. 53–54. It noted, however, that initial consideration of the matter by the Commission followed by judicial review was preferable to immediate resort to the courts on a subject involving the Commission's primary jurisdiction.

Moreover, the existence of administrative power under the Communications Act is an entirely different question from the authority of the courts under the All-Writs Act presented in *Dean*. And in *Dean* it was recognized that the FTC had no statutory authority *itself* to issue injunctions, because of the absence of any provisions in the Federal Trade Commission Act, similar to Sections 4(i) and 303(r) of the Communications Act, conferring such authority on that agency. In addition, the dissent in *Dean* noted (384 U.S. at 618–619) the somewhat different functions performed by the FTC and the Department of Justice in administering Section 7 of the Clayton Act. Under the Communications Act, however, no such enforcement counterpart of the Commission exists.

grounding that conclusion on a lack of jurisdiction over non-licensees such as CATVs, the court below has seriously impaired the Commission's role in protecting the public interest with respect to an important new development—CATV. Review by this Court is thus plainly warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General,
DONALD F. TURNER,
Assistant Attorney General,
HOWARD E. SHAPIRO,
Attorney,
Department of Justice.

HENRY GELLER,
General Counsel,
DANIEL R. OHLBAUM,
Deputy General Counsel,
Federal Communications Commission.

JULY 1967.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SOUTHWESTERN CABLE CO., *Petitioner,* vs. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents,* JACK O. GROSS, et al., *Intervenors.*	No. 21,183
MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP., *Petitioners,* vs. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents,* JACK O. GROSS, et al., *Intervenors.*	No. 21,192

[April 28, 1967]

On Petition for Review of a Memorandum Opinion and Order of the Federal Communications Commission

Before: BARNES and ELY, Circuit Judges; PECKHAM,* District Judge

BARNES, Circuit Judge:

This is a consolidation of two petitions to review and set aside portions of an order of the Federal Communications Commission

*Robert F. Peckham, Northern District of California, sitting by designation.

(hereinafter "FCC" or "Commission"). Our jurisdiction rests upon 5 U.S.C. § 1032 and 47 U.S.C. § 402(a).

Southwestern Cable Company owns a community antenna television system (commonly designated a CATV system) in the San Diego area. Mission Cable TV, Inc. and Pacific Video Cable Company own CATV systems in the San Diego area which are operated by Trans-Video Corporation which owns all of Pacific and a majority of Mission.

CATV is a way of delivering good television reception to areas greatly removed from the originating station. The concept includes the building of a large antenna in an area where reception is good. The antenna picks up the signal of one or more stations and transmits it or them, either by wire or microwave, to the area of poor reception. In the poor reception area the signal is distributed to individual television receivers by wire, each receiver paying installation and monthly service fees. Southwestern, Mission and Pacific, petitioners here, all use cable systems rather than microwave for transmission of the signals.

San Diego is about 120 miles south of Los Angeles. San Diego is served by two VHF and one UHF television stations in San Diego and two VHF stations in nearby Tijuana, Mexico. A construction permit has been issued for another UHF station, and an application is pending for still another. For the most part, San Diego receivers cannot receive the signals of Los Angeles stations through the air. It is by CATV that many San Diegans can now watch Los Angeles programs.

The recent growth of CATV systems has come to the attention of the FCC. At first the FCC, without dissent, held it had no jurisdiction over CATV. 26 F.C.C. 403, 427-28 (1959). It next held it was authorized to deny a CATV microwave transmission license for economic reasons. *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962, *aff'd* 321 F.2d 359 (D.C. Cir. 1963)), *cert. denied* 375 U.S. 951 (1963). It then asserted jurisdiction only over CATV systems using microwave facilities to transmit their signals. See First Report and Order, 38 F.C.C. 683, 30 Fed. Reg. 6038 (1965). On April 23, 1965, the Commission released a Notice of Inquiry and Notice of proposed Rule Making (1 F.C.C.2d 453, 30 Fed. Reg. 6078 (1965)) looking toward regulation of all CATV systems. On February 15, 1966, the Commission issued a news

release announcing that new rules would shortly be adopted applying to non-microwave CATV systems. These rules were adopted on March 8, 1966, and published on March 17, 1966. Second Report and Order, 2 F.C.C.2d 725, 31 Fed. Reg. 4540 (1966). The rules provided, inter alia, that (1) CATV systems must carry the signals of local and nearby stations, (2) CATV systems cannot carry on the same day a signal which duplicates a program of a local station, and (3) Commission approval is required for a CATV system to carry a signal beyond its Grade B contour.[1]

In addition to the foregoing rules, the Commission adopted Rule 74.1109 (47 C.F.R. § 74.1109), which provides that on petition by a CATV system, television station or other interested person the Commission may waive any of its rules or impose additional requirements. Rule 74.1109(f) provides in part:

> "In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief."

On March 17, 1966, Midwest Television, Inc., a licensee of a San Diego VHF station (and herein an intervenor), petitioned under Rule 74.1109(f) for temporary relief pending a hearing on the effects of CATV on the television stations in San Diego. On July 25, 1966, the Commission, in the order under review here, granted Midwest the temporary relief it sought by limiting the CATV systems, petitioners here, to (1) delivering Los Angeles

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[1]Grade B is one of a trio of ratings according to the strength of a signal. The grades are defined in terms of the level of signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade—90%; Grade A—70%; Grade B—50%.

The signal, of course, is strongest nearer the point of origination, and becomes progressively weaker as it is removed further from the point of origination. Intervening obstacles such as mountains or other high elevations, poor ground conductivity, or seasonal and other changes in atmospheric conditions can often impair or make impossible good television reception. That area where the signal reception is Grade B is described as being within the Grade B contour. CATV systems, of course, build their antennae in Principal City areas and then carry the signals into the Grade B contour and beyond.

signals to subscribers in the area which they served on February 15, 1966; (2) adding subscribers in other areas, but to them carrying only San Diego-Tijuana signals; and (3) continuing to provide the service they had been providing prior to the date of the order.

Petitioners sought review by this court of the July 25, 1966 order, and asked for a stay of the Commission's order. After argument we issued an interlocutory injunction against enforcement of the order as it prevents the addition of new subscribers to the trunk and feeder lines in existence on August 23, 1966.

Petitioners have specified many grounds for setting aside the Commission's order, some of constitutional dimension. Initially we must consider the assertion that the Commission did not have the power to issue the order in question. We agree with the petitioners that the Commission was without power to act as it did.[2]

The order issued by the Commission was prohibitory in nature. Though petitioners contend that it was in truth a cease and desist order, the Commission has expressly denied that it is such an order and disclaimed the authority of 47 U.S.C. § 312 which authorizes such orders. The Commission tells us that its only

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[2]After this case was heard, the Commission issued its Memorandum Opinion and Order, disposing of various petitions which had been filed, largely by cable-television owners and operators, seeking reconsideration of the Commission's Second Report and Order (2 F.C.C.2d 725) which had adopted rules with respect to CATV. Memorandum Opinion and Order, ... F.C.C.2d ..... (released January 19, 1967). Of the seven Commissioners, one did not participate, one was absent and two dissented. See particularly the dissenting opinion of Commissioner Loevinger, wherein he states, among other things:

". . . [I]t is by no means clear that there is a majority of the Commission in support of the jurisdiction that is in fact being exercised; . . . .

"If such reasons [as given in the majority opinion] are adequate to support jurisdiction, then there is no limit to the authority of this Commission.

"I do not believe that Congress even intended to grant or will in the future ever act to grant such a vague and limitless jurisdiction as the Commission now asserts and exercises. . . . [T]here is a strong . . . reason for insisting that the broad power of regulation should be confined within the jurisdiction specified by Congress in statutes, ..."

sources of authority for the order in issue are section 4(i) of the Act[3] and section 303(r) of the Act.[4]

> "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).
>
> ". . . [T]he Commission . . . shall—
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." 47 U.S.C. § 303(r).

These provisions are general, couched in broad and indefinite terms.[5] There is no doubt that Congress intended by these provisions to provide the Commission with a degree of flexibility in performing its important tasks. Such provisions, however, by their own terms, are to be measured by the Act and its structure and purpose.

The method of regulation of broadcasting chosen by Congress was licensing. The Commission was created and charged with supervising the licensing function, to the end of promoting the development of the best radio (and later television) service in the public interest. To fulfill its duties the Commission was given two

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[3]47 U.S.C. § 154(i). References to the Act or to sections are to the Communications Act of 1934, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.), unless otherwise indicated.

[4]47 U.S.C. § 303(r).

[5]We note in passing the placement of these provisions within the structure of the Act. Section 154(i) is preceded by a provision defining a quorum and authorizing judicial notice of the Commission's seal (47 U.S.C. § 154(h)), and followed by one regarding the conduct of proceedings (47 U.S.C. § 154(j)).

Section 303(r) is preceded by a provision authorizing the Commission to require painting or illuminating of radio towers (47 U.S.C. § 303(q)), and followed by one authorizing the Commission to require all television receivers to be able to receive all frequencies.

weapons under section 312, revocation of the license and (since 1952) the cease and desist order. Restricting these powers, however, Congress specified certain procedural safeguards, 47 U.S.C. § 312(c), (d) and (e).

We are fully aware of the authorities which have sustained grants of power to agencies and interpreted such powers so as to give those agencies a high degree of flexibility. In *Clear Channel Broadcasting Service v. United States*, 284 F.2d 222 (D.C. Cir. 1960), the FCC's powers, specifically including section 303(r), were described as "broad" in reference to an order regarding skywave interference. In *Public Service Comm'n v. FPC*, 327 F.2d 893 (D.C. Cir. 1964), the District of Columbia Circuit discussed the powers of the Federal Power Commission with language which we feel is equally applicable to the authority of the FCC.

> "All authority of the Commission need not be found in explicit language. . . . While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail." 327 F.2d at 897.

We cannot, however, extend this language to include the power claimed by the Commission in the case at bar. We note some of the cases in which the Commission's authority has been sustained. *Bendix Aviation Corp. v. FCC*, 272 F.2d 533 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 965 (1960), concerned an application by Bendix for authority to use the 430 Mc radio frequency in developing an aircraft collision prevention system. Prior to the application, frequencies in the 420-450 Mc band had been reserved exclusively for government use. The court sustained denial of the application without a hearing. The denial of the authority Bendix sought, which would have been a license, was challenged procedurally in that it had been denied without a hearing. Although the court cites section 4(i) and 303(r) of the Act, both of which are set out above, there appears to have been no real challenge to the Commission's power to deny the license, so that the authority for the court's decision is that cited as section 4(j) of the Act (47 U.S.C. § 154(j)), providing for procedural flexibility. *Cf. FCC v. Schreiber*, 381 U.S. 279 (1965).

Mesa Microwave, Inc. v. FCC, 262 F.2d 723 (D.C. Cir. 1958), is a case dealing with CATV problems. Mesa used microwave to

carry signals and therefore needed a license. It filed an application, but no action was taken as the Commission had "frozen" all applications pending an inquiry. The petition for a writ of mandamus was denied because the delay had not been so great (about six months) as to warrant the extraordinary remedy of mandamus. Later, in *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963), the court described the action in *Mesa* as declining to upset a "freeze" on the processing of license applications. In *Kessler* the District of Columbia Circuit affirmed the "freeze" order as it halted the acceptance of applications for certain radio licenses. The basis of the decision was that the "freeze" order was procedural, and the later denial of the applications without a hearing was permissible. The unstated authority is probably section 4(j) of the Act, as in *Bendix, supra.*

The decisions examined above deal either with the licensing authority of the Commission or procedural questions related to licensing proceedings.[6] Petitioners in the case at bar point out that they have not sought a license from the Commission, nor are they required to do so.

Our resolution of the present case is guided by the language of the Supreme Court in *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586 (1950). In that case the FCC granted a license on the condition that the station repudiate its contract with certain persons, which contract, it was found by the Commission, endangered the financial ability of the station. After repudiation, a state court entered judgment for breach of contract against the station. The contention was raised that by its order the FCC had invalidated the contract. The Supreme Court noted the scope of the agency power:

> "As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress. . . . These cases [*FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)] make clear that the Commission's

[6]The Commission's primary authority is such a case. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), dealt with the Commission's rule that it would not issue a license if the applicant already operated five television stations. Storer, owning five, objected that its application for a sixth was denied without a hearing.

regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions." 338 U.S. at 597-99 (footnotes omitted).

Dealing specifically with one of the provisions in issue here, to wit, the powers under section 303(r) of the Act, the Court said:

> "One suggestion is that petitioner's position has a specific statutory basis [for invalidating the contract] in § 303(r), which permits the Commission to prescribe such 'conditions' as are 'necessary to carry out the provisions' of the Act. We do not think the suggestion is sound. Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power. *It is in connection with this power that § 303(r) is to be interpreted.*" 338 U.S. at 600 (emphasis added).

In *Carroll* the Court recognized the Commission's embarrassing lack of ability to issue cease and desist orders together with its attempts to remedy the situation. The Court noted that the Commission had requested the power from Congress, "but, so far as we are aware, the Commission request did not go beyond asking for power to issue a cease and desist order *against a licensee.*" 338 U.S. at 602 (emphasis added). The Court had reference to S. 1333, 80th Cong., 1st Sess. (1947), which was one of the predecessors to the Communications Act Amendments, 1952, 66 Stat. 711 (1952). It was the 1952 amendments which enacted the cease and desist authority of section 312 of the Act.[7] We point this out to show that in 1950, when *Carroll* was decided and sections 4(i) and 303(r) were exactly as they are today, the power the Commission possessed was exercisable only against licensees or applicants. Put another way, sections 4(i) and 303(r) did not, in 1950, authorize action against a nonlicensee.

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[7]The direction of the Commission's powers was apparently understood by Congress to be limited to licensees when it considered the 1952 amendments to the Act. "It is believed that the authority to issue cease and desist orders will give the Commission a means by which it can secure compliance with the law and regulations *by licensees.*" Conf. Rept. No. 3426, 1952 U.S. Code, Cong. & Ad. News 2234 (emphasis added).

The Supreme Court again analyzed the limits of the Commission's power in *FCC v. American Broadcasting Co.*, 347 U.S. 294 (1954). In that case the Commission had issued rules against "give-away" programs. The Court was concerned with the relationship between the Commission's action and the criminal sanctions against broadcasting lottery information, 18 U.S.C. § 1304.

> "Like the court below, we have no doubt that the Commission, concurrently with the Department of Justice, has power to enforce § 1304. Indeed, the Commission would be remiss in its duties if it failed, *in the exercise of its licensing authority*, to aid in implementing the statute, either by general rule or by individual decisions.[7] But the Commission's power in this respect is limited by the scope of the statute. Unless the 'give-away' programs involved here are illegal under [18 U.S.C.] § 1304, the Commission cannot employ the statute [the Communications Act] to make them so by agency action." 347 U.S. at 289-90 (emphasis added).

The Court's footnote specifically notes sections 4(i) and 303(r). In view of the emphasized portion of *American Broadcasting* and the specific language of *Carroll*, we reach the conclusion that sections 4(i) and 303(r) are limited to the scope of the Commission's licensing authority. *Cf. Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 433-34 (1963) (Brennan, J., concurring).

The logic of our conclusion seems to us inescapable. If the authority of sections 4(i) and 303(r) were as broad and extensive as the Commission urges, the authority of section 312 to issue cease and desist orders would be meaningless or repetitive. There is nothing to indicate that if the Commission is empowered to issue an order like that under review it cannot similarly issue a cease and desist order without the safeguards of section 312. *Cf. United States v. National Plastikwear Fashions, Inc.*, 123 F.Supp. 791 (S.D. N.Y. 1954). We must assume that when Congress in 1952 gave the Commission the power to issue cease and desist orders it was not duplicating an already existing power.

Our conclusion that the Commission lacked the power to issue the order in question requires that the order be vacated and set aside. In light of our disposition of the case, we decline to express any opinion as to the other issues raised in this proceeding.

The Memorandum Opinion and Order of July 25, 1966, is VACATED and SET ASIDE to the extent that it limits the operations of the petitioners as set forth in paragraphs 24-26 of that order.

ELY, Circuit Judge (Concurring):

I endorse the carefully researched opinion of my Brother Barnes, and I concur in its conclusions. I think it appropriate, however, to emphasize the basic justice of our decision.

As Judge Barnes relates, the Commission had, prior to the commencement of petitioners' activities, disavowed its power to regulate such activities.[1] It is not unreasonable to assume that the petitioners considered this history in making their determinations to embark upon their ventures. They then undertook their lawful pursuits, investing substantial sums of money and, incidentally, proceeding under the auspices of the responsible San Diego officials who issued the required municipal permits. Not until petitioners had incurred the expense of installing necessary and fixed facilities and had acquired subscribing customers did the Commission presume to issue the order which, if enforceable, would adversely affect, if not destroy, the petitioners' investments.

In the light of the only conferred powers under which its authority exists, reviewed by my Brother Barnes, and in the light of all the circumstances, some of which I have briefly stated, I believe that the Commission trespassed upon constitutional safeguards against the confiscation of property.[2]

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[1]It had unsuccessfully sought legislation which would have specifically given it the jurisdiction which it now claims to have always had S. 2653, 86th Cong., 1st Sess. (1960).

[2]Compare *California Citizens Band Association, Inc. v. United States*, ... F.2d ..... (9th Cir. 1967), wherein we very recently held that the Commission was fully empowered to adopt reasonable regulations affecting licensees whose operations clearly fell within the Commission's jurisdictional powers of supervision and regulation.

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 21183

SOUTHWESTERN CABLE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS; JACK O. GROSS, ET AL., INTERVENORS

No. 21192

MISSION CABLE TV, INC., PACIFIC VIDEO CABLE COMPANY AND TRANS-VIDEO CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS; JACK O. GROSS, ET AL., INTERVENORS

Before BARNES and ELY, Circuit Judges, and PECKHAM, District Judge.

DECREE

These causes came on to be heard upon the petitions of Southwest Cable Company and Mission Cable TV, Inc., Pacific Video Cable Company and Trans-Video Corporation, to review a memorandum opinion and order of the Federal Communications Commission issued by it on July 25, 1966, with an erratum issued on July 26, 1966.

The court heard argument of respective counsel on January 10, 1967, and has considered the briefs and transcript of record filed in these causes. On April 28, 1967, the court being fully advised in the premises handed down its opinion in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the memorandum opinion and order of July 25, 1966, of the said Federal Communications Commission is vacated and set aside to the extent that it limits the operations of the petitioners as set forth in paragraphs 24–26 of that order.

APPENDIX C

Before the Federal Communications Commission,
Washington, D.C.

Docket No. 16786

IN THE MATTER OF THE PETITION OF MIDWEST TELEVISION, INC. (KFMB–TV), SAN DIEGO, CALIFORNIA, FOR IMMEDIATE TEMPORARY AND FOR PERMANENT RELIEF AGAINST EXTENSIONS OF SERVICE OF CATV SYSTEMS CARRYING SIGNALS OF LOS ANGELES STATIONS INTO THE SAN DIEGO, AREA, PETITIONER

v.

MISSION CABLE TV, INC., EL CAJON, CALIFORNIA, SOUTHWESTERN CABLE CO., SAN DIEGO, CALIFORNIA, PACIFIC VIDEO CABLE CO., INC., EL CAJON, CALIFORNIA, TRANS-VIDEO CORP., EL CAJON, CALIFORNIA, RANCHO BERNARDO ANTENNA SYSTEMS, INC., LA JOLLA, CALIFORNIA, AND POWAY CABLE TV, POWAY, CALIFORNIA, RESPONDENTS

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners BARTLEY and LOEVINGER dissenting; Commissioner JOHNSON not participating.

1. The Commission has before it for consideration a petition filed on March 17, 1966, by Midwest Television, Inc. (Midwest), licensee of KFMB–TV, San Diego, California, a supplement thereto filed on April 4, 1966, and responsive pleadings in connection there-

with.[1] The petition was filed pursuant to Section 74.1107 and 74.1109 of the Commission's Rules, adopted March 8, 1966, effective March 17, 1966 (31 F.R. 4540)[2], and requests basically that the Commission immediately order respondents, pending final disposition of the petition, to cease and desist from extend-

[1] The following responsive pleadings have also been filed and considered: Comments of Jack O. Gross, (Gross) permittee of Station KJOG–TV, San Diego, filed on April 15, 1966; Opposition to petition and supplement filed by Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp. (hereafter collectively referred to as Mission) on April 18, 1966; Opposition to petition and supplement filed by Southwestern Cable Co. (Southwestern) on April 18, 1966; a Statement of Position filed by Southwestern on April 18, 1966; a Motion to Sever filed by Southwestern on April 18, 1966; a Motion to Dismiss filed by Southwestern on April 18, 1966; an Opposition and Petition to be Dismissed filed by Rancho Bernardo Antenna System (Rancho) on April 18, 1966; a Reply of Petitioner to Opposition to petition for immediate temporary relief and Answer to Motion to Dismiss petition for immediate temporary relief filed by Midwest on April 25, 1966; an Answer to Motion to Sever filed by Midwest on April 25, 1966; a Reply of Petitioner to Oppositions to petition for permanent relief and Answer to Motions to Dismiss petition for permanent relief filed by Midwest on May 2, 1966; and a Reply to Answers of Midwest to Motions to Sever and Dismiss filed by Southwestern on May 5, 1966. Additional interlocutory pleadings concerning extensions of time were filed and have been acted upon, pursuant to delegated authority. On April 6, 1966, Poway Cable TV filed a motion asking that it be dismissed as a party respondent; Midwest filed an answer stating that in view of the agreement reached, it would be appropriate to dismiss Poway as a party. We will grant this request.

[2] Section 74.1107 of the Commission's Rules relates to CATV systems operating or proposing to operate in one of the top 100 television markets and carrying distant television stations' signals. Section 74.1109 of the Rules relates to the filing of petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

ing service to additional subscribers served by their respective systems within the Grade A contours of the San Diego stations and, after any necessary hearing, issue a final order appropriately confining carriage of Los Angeles television signals by respondents' San Diego area systems. In its later pleadings, Midwest modified its initial request for temporary relief to a request that respondents be directed not to extend the Los Angeles television signals to subscribers beyond the specific geographic boundaries of areas in which subscribers were being served on February 15, 1966.

2. In support of its requests for relief, Midwest states that respondents are the holders of franchises to operate CATV systems issued by the cities of San Diego, Chula Vista, National City, La Mesa, Imperial Beach, El Cajon, and San Diego County.[3] The City of San Diego has a population of approximately 648,500 occupying 208,631 housing units and the County of San Diego has a population of approximately 1,213,000 occupying 379,483 housing units; nearly all of the county population lies within the Grade A contour of KFMB–TV and San Diego is ranked by the American Research Bureau as the 54th market based on net weekly circulation. San Diego is presently served by five television stations, a construction permit has been issued for Channel 51 (KJOG), an application is pending for Channel 15, and the assignment of an additional UHF commercial channel to San Diego is under consideration in Docket No. 14229. Midwest alleges that respondents' CATV systems carry the signals of between six and nine Los Angeles television

[3] Trans-Video is 100% owner of Pacific Video, majority owner of Mission Cable and has a minority interest in Southwestern. It has no franchises and is a management company. Trans-Video operates under contract the CATV systems owned by and franchised to Mission, Southwestern and Pacific.

stations none of which stations provide measured or calculated Grade B service to more than the northern portion of the city of San Diego nor to any parts of six other separate communities adjacent to the city; that all of Mission's systems except Poway supply regularly eight Los Angeles stations beyond their calculated Grade B contours (Mission's Poway system carries three beyond Grade B signals and the independent Poway system carries two); that neither Poway nor Rancho Bernardo receive actual Grade B service from any Los Angeles stations; and that Southwestern supplies regularly to all of its subscribers at least three Los Angeles stations beyond their calculated Grade B contours.

3. Midwest goes on to allege that within the past year, and increasingly in recent months and weeks, there has been "widespread and intensive CATV activity within KFMB–TV's Grade A contour" and that service to Poway, Chula Vista and Pacific Beach was instituted only two to four months prior to the filing of the petition. It is alleged that the other systems have greatly extended their lines and substantially increased the number of subscribers since April of 1965; that the systems have increasingly emphasized the laying of lines, far outstripping the solicitation and hooking up of new subscribers; with cables being strung in some areas for miles with very few drops and in some cases none; and in those communities where the systems are operational or wired, only portions of such communities are involved. Midwest estimates that as of February 15, 1966, there were 17,000 homes in the county and within the station's Grade A contour connected to cable systems, of which approximately 6,500 were located in the city; that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are at present approximately

294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and this figure represents approximately 78% of all homes in the county within the Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are alleged to be in areas covered by CATV franchises. Because of the alleged emphasis on line extensions rather than on hook-ups, Midwest contends that a large number of new subscribers could be wired up in a relatively short time even if there were no further cable expansion.

4. Midwest contends that the importation of a multiplicity of distant signals will, if allowed to expand, fragment and drastically reduce the local stations' viewing audience notwithstanding the non-duplication rules. Midwest points out that in its case, 44% of its programming is non-network and will be subject to duplication and that, with respect to the San Diego independent stations, nearly 100% of their programming will be subject to duplication; that virtually all of the non-network recorded programs now under contract to the San Diego stations are also under contract or available to the Los Angeles stations; that the importation of such programs impairs their value to the San Diego stations and causes audience losses, eventually resulting in reduced advertising revenues and curtailed local and quality programming; that over 94% of the Los Angeles programs carried on the respondents' systems in a given week have been, are being, or will be duplicated on San Diego stations in the same form or by way of San Diego equivalents; and analysis of the remaining 6% indicates that the same public interest is or would be served in an alternate way by the San Diego stations.

5. Midwest also alleges that respondents' systems,

with the exception of Poway Cable TV, carry the signal of KFMB–TV on channel but materially degrade the quality of the signal broadcast, particularly the color signals; that the signal of the local UHF station, KAAR, is markedly worse on the cable than those of the VHF stations; that the signals of the Los Angeles stations appear better on the cable than those of the local stations despite the fact that the Los Angeles stations generally do not place a Grade B signal over San Diego; and that the effect of degradation has been not only to damage the local station's reputations but has placed the distant signals on a higher competitive level than the local signals.[4] Finally, Midwest contends that in addition to the foregoing considerations, the CATV situation in San Diego falls squarely within the principle enunciated in the *Second Report* in footnote 69, where the Commission pointed out that, although, in general, CATV activity which does not involve extension of a signal beyond its Grade B contour may continue, an important exception exists where two major markets fall within one another's Grade B contours. In such a situation, the carriage by a CATV system in Baltimore, for instance, of the Washington signals might equalize the quality of the distant signals, change the viewing habits of the local population and affect the development of local television stations. Midwest contends that the San Diego-Los Angeles situation is a classic illustration of this problem and that relief should be afforded on this basis as well as the basis previously set forth.

[4] Midwest states that because of degradation, the Pacific Beach system carries KFMB–TV on Channels 8 and 2, but that this dual carriage confuses the public, weakens its station identification and causes possible ratings losses.

6. In view of the above, Midwest requests, essentially, that the Commission issue a final order appropriately confining carriage of Los Angeles signals by respondents' systems and that, if a hearing is necessary, the respondent be ordered to confine delivery of the Los Angeles signals to subscribers located within the specific geographic boundaries inside of the general geographic areas where the systems were operating on February 15, 1966.[5] In a document filed on April 15, 1966, Jack O. Gross, holder of a construction permit for UHF station KJOG–TV, Channel 51, San Diego, supports the Midwest petition and states that a grant of the requested relief would materially contribute to the success of UHF in San Diego generally and KJOG in particular.

7. Mission's opposition, filed on behalf of Mission, Pacific and Trans-Video, contends that the Commission can only issue temporary relief in accordance with the provision of Section 312 of the Communications Act (47 U.S.C. 312(c)) and that there is no statutory authority for the type of relief requested. Mission contends that such relief is analogous to a motion for stay and that, as such, it is inadequate be-

[5] In support of its request for temporary relief pending the outcome of any hearing, and in an attempt to describe the extent of respondents' operations in San Diego and southwestern San Diego county as of February 15, 1966, Midwest filed a Supplement to its petition, to which it attached a map purporting to show that there were eight separate islands of CATV subscriber service as of February 15, 1966 located in recognized geographical areas in San Diego which were further circumscribed by recognizable and known geographical limitations and boundaries within the larger geographical areas. In the Supplement, Midwest alleges that since February 15, 1966, the respondents have extended lines and service beyond the specific boundaries within the general areas and also into entirely new geographic areas.

cause Midwest has failed to show irreparable injury to itself (Mission contends that Midwest's allegations in this regard are only conclusionary and not supported by material facts); has failed to demonstrate injury to the public (Mission contends that allegations in this regard are also conclusionary and highly speculative and denies that there is any degradation of the San Diego stations' signals by the CATV systems); and has not demonstrated that there is a likelihood that it will succeed on the merits (Mission contends that Midwest's allegations relating to a "pell-mell" extension of cable lines are completely unsupported by facts, is untrue, and that respondents have merely continued their normal wiring activity).

8. Mission alleges further that there is nothing in the rules which prohibits the actions of respondents which Midwest seeks to prevent since the rules speak of extension of signals to "new geographic areas" and Midwest has not factually supported its allegation that there has been such an extension. Further, Mission contends, Midwest has failed to show that the signals extended are beyond predicted Grade B and it is Mission's position, in any event, that its Poway system is "grandfathered" under the rules since it was franchised under the San Diego county franchise; service had commenced prior to March 17, 1966, and the county-wide franchise authorized CATV at any place in San Diego county outside of corporate limits.[6] Mission states that the outside-of-corporate

[6] Midwest had alleged, in its petition, that Mission's system in Poway had commenced operations after February 15, 1966 in violation of Section 74.1107 of the Rules, and requested that the Commission issue a cease and desist order as to said system. On April 6, 1966, after an independent inquiry, the Commission issued an Order to Show Cause why a cease and desist order should not be issued with respect to the Poway operation. FCC

limits construction in San Diego has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Finally, Mission alleges, with respect to the request for temporary relief, that the public will be irreparably injured since it ignores the need for expansion of television service, prevents expansion of educational television, deprives the public of improved color reception, municipalities of revenues from CATV and potential subscribers of the same choice of programs that their neighbors who have already subscribed have; that respondents will be irreparably injured since their franchises may be forefeited if construction is delayed, contract rights may be lost, and respondents' employees may lose their jobs; the Commission's Rules are yet untested and are probably illegal; and the rights of Midwest or the public can be fully protected by a decision on the merits, after a hearing, if the Commission determines that any action is required.

9. As to Midwest's request for permanent relief, Mission incorporates its same arguments with respect to the request for temporary relief and contends further that its franchises were obtained before the Commission decided to exercise jurisdiction and that construction and installation of cable was started before February 15, 1966 or March 17, 1966. Additionally, Mission alleges that while CATV is a less expensive and more convenient type of antenna service for signals already present in San Diego, CATV is needed in certain areas in order to provide adequate reception of San Diego Channel's 8 and 10 and that

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66-292, April 6, 1966. On June 22, 1966, the Commission issued a Cease and Desist Order as to Mission's Poway system. FCC 66-548,

CATV expansion is necessary for the acceptance and viability of UHF stations. Mission points out that since the San Diego stations' programs can not be duplicated on the same day and surveys show that during prime time the San Diego stations have 84% of the viewing audience, it does not appear that fragmentation of the remaining 16 to 20% of the television audience, among the four or five Los Angeles independents and the San Diego UHF, could have any serious impact on the ability of the San Diego network stations to continue their operations. Finally, Mission contends that the addition of subscribers to its systems after February 15, 1966, does not constitute extensions to new geographical areas since, under its city franchises, the appropriate geographic boundaries are the city limits and, under its county franchises, the appropriate boundaries are the unincorporated areas of the county.[7] In view of all of the above, Mission requests that Midwest's petition, both as to temporary and permanent relief, be denied.

10. Southwestern filed an Opposition, a Motion to Sever, and a Motion to Dismiss.[8] In its pleadings, Southwestern alleges that the petition must fail since Midwest has failed to show that its system is carrying beyond Grade B signals and that Southwestern's engineering studies show that the commercial television signals which it is carrying are all of Grade B intensity. Southwestern further contends that its sys-

[7] Mission submitted a map with its opposition showing the area of each franchise; the portion of each franchise receiving service prior to February 15, 1966; the portion of each franchise receiving service after February 15, 1966; and the portion of each franchise which was "fielded" and/or under construction as of April 12, 1966.

[8] Southwestern also filed a Statement of Position which is being treated in connection with the petitions for reconsideration of the Second Report and Order.

tem is "grandfathered" since it began operating prior to February 15, 1966, is not expanding throughout the entire community or into new areas, and has only continued normal wiring operations. Moreover, Southwestern alleges that its system helps UHF and that while Midwest has submitted no probative data regarding impact, Southwestern's market study, a copy of which it attached as an exhibit to its opposition, shows that CATV helps UHF generally and Channel 39 specifically since carriage of the UHF station on the cable increases the station's audience, improves its picture quality, and provides greater penetration for, and viewing frequency of the station. Southwestern also points out that Midwest's claim of signal degradation does not relate to its system since it has always carried Midwest's station on channels 8 and 2 of the cable. Southwestern also claims that its franchise area is unique since the residents and antennas in that area are oriented to the Los Angeles stations and since it is within the predicted or measured Grade B contours of the commercial signals of the stations carried on its system. Southwestern contends that Midwest's showing of fragmentation has no applicability to its system since the survey was conducted in a part of San Diego where the off-the-air reception of the Los Angeles stations is of less quality, the survey was conducted prior to the commencement of service by Southwestern and the various sections of San Diego vary significantly, and the audience survey findings relate to areas of San Diego where the CATV systems carry the full schedules of the Los Angeles CBS and NBC stations while Southwestern's system carries only the San Diego CBS and NBC stations. Finally, Southwestern alleges that while Midwest has failed to show that it would be irreparably injured by denial of the temporary relief, Southwestern would

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suffer irreparable injury since a grant of temporary relief would dry up Southwestern's financing and cause bankruptcy. As to the request for permanent relief, Southwestern contends that while Midwest has essentially requested the Commission to designate a "Carroll" type issue, it has completely failed to furnish detailed evidentiary material. Accordingly, Southwestern requests that it be severed from the other respondents and that the petition and supplement, insofar as they relate to it, be denied or dismissed.

11. Rancho Bernardo, in its opposition, states that it operates a system in northern San Diego under a franchise from the city of San Diego and that the system is part of a housing development of 5,400 acres, approximately 400 acres of which have been developed. The system is designed to serve only the residential community and there is no intention of extending beyond those boundaries. Rancho Bernardo states that there are now approximately 1,000 subscribers to the system or 99% of the occupied housing units and service is expanding in an orderly fashion to serve all the new residential units with the timing of service extension being determined solely by the sales of residential units. Rancho Bernardo contends that the area receives unsatisfactory off-the-air television reception, is not within the Grade A contour of KFMB–TV, and may be within the Grade B contours of some Los Angeles stations. Rancho Bernardo denies that it degrades the KFMB signal and alleges that a grant of temporary relief would irreparably injure it because it would impede the sales of homes and would not help KFMB since it would make its signal unavailable in the area. Rancho Bernardo requests denial of the temporary and permanent relief and asks that it be dismissed from the proceedings.

12. In its responsive pleadings, Midwest points out that there is no factual dispute as to Mission's and Southwestern's intentions to continue expansion throughout the various geographic areas covered by their franchises. Midwest contends that temporary relief is necessary to prevent this great expansion of these major market systems until resolution of the public interest questions presented. Midwest alleges that, similarly, with limited exceptions, there is no real dispute as to the regional and specific geographic areas described by it; that since respondents have not wired up all of the homes within the specific geographic areas designated, restriction to such areas, *pendente lite,* would not prevent normal wiring operations; and that, therefore, there is no showing by respondents that an interim stay would impair the ability of the systems to continue operations. Midwest alleges that Mission makes no claim that its viability would be impaired and that Southwestern's claim of irreparable injury assumes a total prohibition against new subscribers; Southwestern does not claim that if it were limited to new subscribers within the specific geographic areas designated as of February 15, 1966, it would be irreparably injured.

13. Specifically, with respect to Mission, Midwest alleges that it has offered no factual information to refute the allegations of rapid line expansion; that Mission's map, in large part, confirms the boundaries specified by Midwest and, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966; that Mission's arguments regarding need for CATV service are invalid because 1) the entire public will lose if the local stations are forced off the air or required to curtail operations and 2) over 94% of the Los Angeles stations' programs have been, are, or will be essen-

tially duplicated by the programming of the San Diego stations; and that irreparable injury to Mission's systems has not been demonstrated since 1) there has been no showing that Mission's systems were not viable as of February 15, 1966, 2) there has been no showing that its franchises or contracts *will* expire or be forfeited if interim relief is granted (Midwest points out that the franchises do not require carriage of the Los Angeles stations and that the systems could expand without restriction carrying only San Diego signals); and 3) employee lay-off would occur only if respondents were ordered to halt all normal wiring and hook-up of new subscribers, but this has not been requested. Mission's county-wide grandfathering argument, contends Midwest, completely ignores the meaning of paragraph 149 of the Second Report and Order.

14. Midwest alleges, in response, that Southwestern does not challenge Midwest's designation of appropriate geographic areas and that since there are thousands of residents in these areas not yet on the cable, a grant of temporary relief as to Southwestern would not halt its normal wiring activities (Southwestern claims about 900 subscribers at present). Further, Midwest alleges, Southwestern's argument as to being "grandfathered" in the entire franchised area, because it was serving 350 subscribers on February 15, 1966, completely ignores the import of the Second Report and Order; Southwestern's attempt to show that its franchised area receives Grade B signals from Los Angeles is completely inadequate from an engineering standpoint and its market survey techniques are defective and its conclusions unsupported.[9] Finally, Midwest contends that while South-

[9] Midwest points out that while cable subscribers interviewed had two UHF stations available to them (Channel 28, Los

western's allegations concerning impact relate to the short run benefits to UHF of carriage on CATV, these benefits decrease as penetration of all-channel receivers increases and that Southwestern has set forth no basis for being treated differently than the other respondents in this proceeding.[10] As to Rancho Bernardo, Midwest states that in light of the representations as to extension Midwest will not press its request for temporary relief. However, Midwest contends that no basis has been shown for dismissal of Rancho Bernardo from the proceeding; that dismissal of Rancho Bernardo would have the effect of grandfathering an area 1350% larger than the area in which service is presently being rendered; and that no allegation has been made that Rancho Bernardo's participation would constitute a hardship to it or cause it damage.

15. With respect to its request for permanent relief, Midwest states that the real issue is whether CATV should be allowed to import distant signals which would result in impairing the service capabili-

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Angeles, and 39, San Diego) the Los Angeles UHF is not available off the air, and the survey only proves, at most, that viewers with two available UHF stations to watch, will view UHF 1.77 times as much as viewers with one, and that, if UHF viewing by cable subscribers is divided equally between the two stations, Channel 39 is viewed 11% fewer times in cable homes than in non-cable homes. Midwest also pointed out that the survey proved nothing as to reception quality on cable since no distinction was made between Channels 28 and 39 and it was not determined whether the non-cable homes surveyed had UHF antennas.

[10] Southwestern, in its responsive pleadings, repeats its allegations that its franchise area does receive Grade B signals from Los Angeles and that its system does not degrade the signals of KFMB–TV. It also attached a supplementary economic report purporting to show that CATV carriage does help UHF generally and Channel 39 specifically.

ties of network stations and threaten the continued existence or commencement of UHF stations; that carriage provides only short-run benefits to UHF stations; and that same-day non-duplication is insufficient because it has little relevance to non-network programs. In conclusion, Midwest requests that the Commission set the matter for hearing on the issues raised in the petition for permanent relief; that pending final disposition, the respondents be directed not to extend the Los Angeles stations' signals beyond the boundaries previously specified; and that Southwestern's motion to dismiss the petition for temporary relief and Rancho Bernardo's petition to be dismissed from the proceeding be denied.

16. We think Midwest has presented a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area. At paragraph 149 of the Second Report and Order (2 F.C.C. 2d 725), after stating our policy with respect to "grandfathering" the existing operations of CATV systems, we stated:

> We turn now to the question whether systems extending signals beyond their Grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographic areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in

an evidentiary hearing). While there may be a disruptive factor in halting CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, appropriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the geographical extension of the CATV system to new areas, and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and response in the particular case, whether such temporary relief is called for, and if so, its nature.

This case falls squarely within the terms of the policy stated above. There is considerable UHF activity currently under way in San Diego with KAAR (ch. 39) in operation until November, 1965, with an application pending for educational Channel 15, with an outstanding construction permit for Channel 51 (KJOG–TV) and plans to commence operation in the near future. Several of Mission's systems, and Southwestern's system, commenced operations only some two to four months prior to the filing of the petition herein. In view of the size of the area involved (approximately 380,000 housing units in San Diego County), while the respondents' systems have relatively few subscribers, pursuant to their franchises, they have the potential for expanding throughout the entire county.

17. In this latter connection, Midwest has pointed out, and respondents have not denied, that there were

on February 15, 1966, approximately 17,000 CATV subscribers in the county and within KFMB–TV's Grade A contour, of which approximately 6,500 were located in San Diego. It was further pointed out that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are approximately 294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and that this represents approximately 78% of all homes in the county within the station's Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are located in areas covered by CATV franchises. Mission states that construction in unincorporated communities in San Diego County has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Thus, it clearly appears that a hearing is required with respect to the over-all question of whether such potential expansion in this major market is consistent with the public interest. Further, unless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief appropriately limiting further expansion until resolution of the public interest issues is called for.

18. A hearing is also appropriate here because of

the number of unresolved issues present. For instance, there is disagreement as to whether some of respondents' systems are operating within the predicted Grade A contour of KFMB–TV; there is controversy as to whether some of the respondents' systems operate within the Grade B contour of some of the Los Angeles stations carried on the system (but in this respect, see also par. 19, *infra.*); there is a serious question as to whether respondents' systems degrade the San Diego signals carried and particularly the signals of KFMB–TV; the degree of CATV penetration of the market is contested; and, of course, there is controversy as to whether carriage on the systems will help or hurt new or prospective UHF stations in San Diego. These issues are all particularly appropriate for resolution in an evidentiary hearing. We wish to stress that, in view of the importance and novelty of the matters raised, we think considerable latitude should be afforded as to the introduction of evidence on all of these matters.

19. Some of the respondents have alleged that since their systems operate within the predicted or measured Grade B contours of the Los Angeles stations carried on their systems, the provisions of paragraph 149 of the Second Report, *supra,* which relate generally to extension of beyond Grade B signals, do not apply to their systems and that they may, therefore, continue to expand without hindrance. This contention, however, misconceives the main thrust of our major market policy. The Commission's primary concern with respect to CATV operations in the major markets importing distant television signals was whether such operation "may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial

competition of a patently unfair nature" (Second Report, Paragraph 139). We defined "distant signals" as those signals extended or received beyond the Grade B contours of those stations. While this standard will generally encompass our main area of concern (i.e., the importation of signals not allocated to the area), it is by no means a fixed and immutable standard to which we will blindly adhere. As we pointed out in the Second Report, CATV activity which does not involve extension of a signal beyond the Grade B contour may continue, "* * * with possibly only the rarest exception * * *." (Second Report, paragraph 151). This exception involves a situation where, for instance, two major markets fall within one another's Grade B contours and the importation of signals of the stations in one market into the other would equalize the quality of the distant signals, possibly change the viewing habits of the latter community and affect the development of independent UHF stations there. Assuming, *arguendo,* as respondents contend, that their systems are within the predicted or measured Grade B contours of the Los Angeles stations, this is exactly the situation presented here. The Los Angeles stations are located more than 100 miles from the San Diego main Post Office and, while they may provide service to some parts of San Diego, the issue is what kind of service as compared to that of the local San Diego stations, and what is the effect on the latter of CATV which "equalizes" the technical quality of the local San Diego signals and the more than 100 mile distant Los Angeles stations. Thus, the problem is not resolved merely by a showing that the Los Angeles stations do provide Grade B signals to parts of San Diego County.

20. It is clear, therefore, that a hearing is necessary with respect to the overall question of CATV expan-

sion in this major market and that some form of temporary relief is necessary and appropriate "before consequences possibly adverse to the public may develop." Before discussing the nature and form of the temporary relief to be prescribed, there are three matters raised by respondents which we will briefly discuss.

21. First, respondents Mission and Southwestern contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any sort of interim action pending a hearing. However, we have determined in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." Section 4(i). See also Sections 303 (f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see *Federal Trade Commission* v. *Dean Foods Co.*, —— U.S. ——, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the

authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See *Public Service Commission* v. *Federal Power Commission,* 327 F. 2d 893, 896–897 (C.A.D.C., 1964).

president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, *pendente lite,* if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional subscribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they

Insert the following between the paragraph ending "1964).", and the paragraph beginning with the word "president."

Second, respondents Mission and Southwest contend that their systems are grandfathered to the limits of their franchises. We reject this position, since it is totally inconsistent with the policy expressed in paragraph 149 of the second report (see, also Letter to Telerama, Inc., 3 FCC 2d 585). Finally, respondents contend that a grant of temporary relief will cause them irreparable injury.[11] Mission's showing in this regard, however, is speculative, unsubstantiated, and proceeds on a mistaken understanding of the nature of the relief requested. Southwestern furnished an affidavit from a vice

[11] Midwest has withdrawn its request for temporary relief as to Rancho Bernardo.

limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if some form of temporary relief is ordered.[12] We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration.

22. The question now is the nature and form of the temporary relief to be afforded. In its petition, and particularly the supplement thereto, Midwest specified with great particularity and precision "eight separate and discrete islands of CATV subscriber service as of February 15, 1966," alleging that these "islands" were located in recognized geographical areas in San Diego and that the islands were further circumscribed by recognizable and known geographical areas. These latter areas were also described with great precision and it was alleged that from the eight islands, as they existed on February 15, 1966, the respondents have extended and are continuing to extend their lines and service beyond the boundaries within the geographical areas which they partially occupied and, also, into new geographical areas. Midwest asks essentially, that pending final disposition, respondents be ordered to confine delivery of Los Angeles signals to subscribers located within the geographical boundaries inside of the eight general area which circumscribe the areas

[12] We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

where the systems were operating on February 15, 1966.[13]

23. Neither Mission nor Southwestern has factually challenged Midwest's description and specification of the geographic areas and their boundaries. Rather, they take the position that their franchise areas constitute the appropriate geographic limitations. We have, however, rejected this contention (see paragraph 21, *supra*). Mission, with its opposition, submitted a detailed map which, in part, indicates for the entire area where systems were operating on February 15, 1966. Midwest states in its reply that the map, in large part, confirms the boundaries specified by it in its supplement and that, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966. We have also reviewed the map and compared it with the specific boundaries detailed in Midwest's supplement and it appears that, with the exception of the Chula Vista area, the parties are largely in agreement as to the boundaries of the areas where Mission was operating on Februry 15, 1966.

24. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Mission to confine delivery of the Los Angeles signals carried on its systems to subscribers within those areas where Mission indicated in its map (appended as attachment G to its opposition) it was operating on February 15, 1966. We will also accept Mission's map designation with respect to the Chula Vista area, provided, however, that our

[13] Midwest has indicated in a subsequent pleading that it does not object to dismissing Poway Cable TV from the proceeding and that it is not pressing its request for temporary relief as to Rancho Bernardo. Accordingly, we are only concerned with framing temporary relief as to Mission's and Southwestern's systems.

action with respect to Chula Vista is without prejudice to any further showing Midwest may present to support its position as to the geographic boundaries, as of February 15, 1966, of the area served by Mission's Chula Vista system. Upon an appropriate showing, we will give further consideration to Midwest's request to further restrict the Chula Vista system pending final disposition of this proceeding.

25. As to Southwestern, we have previously noted that it has not challenged Midwest's designation of the general and specific areas within which it was operating on February 15, 1966. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Southwestern to confine delivery of the Los Angeles signals carried on its system to subscribers within those areas specified by Midwest in its supplemental petition (paragraphs (A)(1) and (B)(1), pages 10 and 12, respectively, and affidavit, paragraph 5(1), pages 2 and 3), appended thereto. This action will be subject to any further showing Southwestern may wish to present to show that the geographic boundaries of the area in which it was operating as of February 15, 1966, differ from these specified by Midwest. Upon an appropriate showing and request, we will give further consideration to the question of appropriate February 15, 1966, boundaries of Southwestern's systems.

26. It should be noted with respect to the temporary relief described above that both Mission and Southwestern are free to continue to construct lines and add new subscribers and to carry the Los Angeles signals within the specific geographic areas described above. As indicated, it would appear that there are substantial numbers of potential new subscribers located in those areas. Further, Mission and Southwest-

ern may continue to expand their systems within their franchised areas so long as the expansion is confined to the carriage of the San Diego-Tijuana signals. And, finally, respondents may continue their present service to any persons who began receiving service, or who had signed and submitted an accepted subscription request, between February 15, 1966, and the date of this order. As indicated in the Second Report, we have no desire to cause disruption of existing service and we do not, in any event, believe that a roll back is either practical or necessary. While we recognize that the temporary relief which we are ordering may, to some extent, discommode respondents' operations, we do not think that it will cause respondents either substantial hardship or irreparable injury. To the extent that there is some disruption of existing operations and future plans, we find that it is necessary in the public interest.

27. Accordingly, in view of the above, and pursuant to Sections 74.1109 and 74.1107(a) and (d) of the Commission's Rules, IT IS ORDERED, that this proceeding is hereby DESIGNATED FOR HEARING, at a time and place to be specified in a further order, upon the following issues:

1. To determine the locations of trunk and feeder lines (both energized and unenergized) and the location and number of subscribers per half mile (or other comparable convenient unit of measure) or cable to respondents' respective CATV systems as of February 15, 1966, March 17, 1966 and the date of this order, and the locations of the predicted Grade A contours of the San Diego television stations and predicted Grade B contours of the Los Angeles television stations.

2. To determine whether the signals of any of

the San Diego television stations are degraded on any of respondents' respective CATV systems and, if so, the cause, extent and nature thereof.

3. To determine the present actions and plans for the future of respondents with respect to the initiation of pay-TV operations based upon or in connection with their respective CATV operations.

4. To determine the present penetration of CATV service by CATV systems in the San Diego market area and the potential penetration of CATV service under conditions of unlimited expansion.

5. To determine the effects on the audiences of existing, proposed, and potential San Diego television stations of present penetration and of potential penetration under conditions of unlimited CATV expansion.

6. To determine the effects of present service and of unlimited expansion of service by CATV systems, generally, on off-the-air television service from the San Diego television stations and, particularly, on existing, proposed and potential UHF television service in the area.

7. To determine whether any conditions of future imports should be placed on the present operations of respondents' CATV systems and, if so, the nature thereof.

8. To determine whether expansion of any of respondents' CATV systems should be limited and, if so, the appropriate conditions thereof.

9. To determine, in light of the foregoing, whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission.

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It is further ordered, that Midwest Television, Inc. the Chief, Broadcast Bureau, Mission Cable TV, Inc., Southwestern Cable Company, Pacific Video Cable Company, Inc., Trans-Video Corp., Rancho Bernardo Antenna Systems, Inc., and Jack O. Gross, are made parties to this proceeding.

It is further ordered, that respondents have the burden of proceeding and the burden of proof with respect to issue 1; that with respect to issue 2, petitioners have the burden of proceeding and the burden of proof; that respondents have the burden of proceeding and the burden of proof with respect to issue 3; that respondents have the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to respondents' respective CATV systems, and that petitioner has the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to CATV systems other than those of respondents; that petitioner has the burden of proceeding and the burden of proof with respect to issues 5 thru 8.

It is further ordered, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. are directed to limit the operations of their respective CATV systems as set forth in paragraphs 24–26, *supra*.

It is further ordered, that the Motion to Dismiss filed by Poway Cable Television is granted and it is dismissed as a party to this proceeding.

It is further ordered, that the Motion to Sever and the Motion to Dismiss filed by Southwestern Cable Co. and the Petition to be Dismissed filed by Rancho Bernardo Antenna Systems, Inc., are denied.

It is further ordered, that the request for oral argument of Mission Cable Television, Inc., Pacific Video Cable Co., Inc. and Trans-Video Corp. is denied.

It is further ordered, that the petition filed by Midwest Television, Inc., and the supplement thereto, to the extent indicated above, is granted, and, in all other respects, is denied.

It is further ordered, that, to avail themselves of the opportunity to be heard, the parties herein, pursuant to Section 1.221 (e) of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate a written appearance stating their intention to appear on the date set for the hearing and present evidence on the issues specified in this Order.

It is further ordered, that the ruling as to temporary relief shall be effective on the 3rd day, not counting Saturdays, Sundays and holidays, after the day of release of this opinion, provided that, the ruling on temporary relief shall not be effective until judicial determination of the motion for a stay in the case of any respondent which notifies the Commission within two days that it intends to seek judicial review and which seeks judicial review and a judicial stay within 14 days of the day of release of this opinion.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

Adopted: July 20, 1966.
Released: July 25, 1966.

Before the Federal Communications Commission,
Washington, D.C.

Docket No. 16786

IN THE MATTER OF THE PETITION OF MIDWEST TELEVISION, INC. (KFMB–TV), SAN DIEGO, CALIFORNIA, FOR IMMEDIATE TEMPORARY AND FOR PERMANENT RELIEF AGAINST EXTENSIONS OF SERVICE OF CATV SYSTEMS CARRYING SIGNALS OF LOS ANGELES STATIONS INTO THE SAN DIEGO, AREA, PETITIONER

v.

MISSION CABLE TV, INC., EL CAJON, CALIFORNIA, SOUTHWESTERN CABLE CO., SAN DIEGO, CALIFORNIA, PACIFIC VIDEO CABLE CO., INC., EL CAJON, CALIFORNIA, TRANS-VIDEO CORP., EL CAJON, CALIFORNIA, RANCHO BERNARDO ANTENNA SYSTEMS, INC., LA JOLLA, CALIFORNIA, AND POWAY CABLE TV, POWAY, CALIFORNIA, RESPONDENTS

ERRATUM

In the Commission's Memorandum Opinion and Order in the above-entitled proceeding, released July 25, 1966, FCC 66-683, 86406, paragraph 21 is corrected to read as follows:

"21. First, respondents Mission and Southwestern contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any sort of interim action pending a hearing. However, we have determined in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform 'any and all acts, make such rules and regulations, and issue such orders, not inconsistent with

[the] Act, as may be necessary in the execution of [our] functions.' Section 4(i). See also Sections 303 (f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see *Federal Trade Commission* v. *Dean Foods Co.*, —— U.S. ——, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See *Public Service Commission* v. *Federal Power Commission*, 327 F. 2d 893, 896–897 (C.A.D.C., 1964). Second, respondents Mission and Sutohwest contend that their systems are 'grandfathered' to the limits of their franchises. We reject this position since it is totally inconsistent with the policy expressed in paragraph 149 of the Second Report (see, also, *Letter to Telerama, Inc.*, 3 FCC 2d 585). Finally, respondents contend that a grant of temporary relief will cause them irreparable injury.[11]

[11] Midwest has withdrawn its request for temporary relief as to Rancho Bernardo.

Mission's showing in this regard, however, is speculative, unsubstantiated, and proceeds on a mistaken understanding of the nature of the relief requested. Southwestern furnished an affidavit from a vice-president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, *pendente lite,* if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional subscribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if

some form of temporary relief is ordered.[12] We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration."

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

Released: July 26, 1966.

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[12] We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,274

BUCKEYE CABLEVISION, INC.,
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE

D. H. OVERMYER TELECASTING CO.,
PERMITTEE OF UHF TELEVISION STATION WDHO-TV,
STORER BROADCASTING CO.,
THE ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
INTERVENORS

Appeal from the Federal Communications Commission

Decided June 30, 1967

Mr. Robert A. Marmet, with whom *Mr. Peter L. Koff* was on the brief, for appellant. *Mr. Edwin R. Schneider, Jr.*, also entered an appearance for appellant.

Mr. John H. Conlin, Associate General Counsel, Federal Communications Commission, with whom *Mr. Henry Geller*, General Counsel, and *Mrs. Lenore G. Ehrig*, Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. Victor E. Ferrall, Jr., with whom *Messrs. Bernard Koteen* and *Alan Y. Naftalin* were on the brief, for intervenor, Storer Broadcasting Company.

Messrs. Peter Shuebruk and *Herbert M. Schulkind* were on the brief, for intervenor, D. H. Overmyer Telecasting Co.

Messrs. Ernest W. Jennes and *John E. Vanderstar* were on the brief for intervenor, Association of Maximum Service Telecasters, Inc.

Before BAZELON, *Chief Judge*, PRETTYMAN, *Senior Circuit Judge*, and DANAHER, *Circuit Judge*.

BAZELON, *Chief Judge:* Buckeye Cablevision operates a community antenna television system (CATV) in Toledo, Ohio. Prior to May 27, 1966, it supplied paying subscribers with the signals of nine television stations located in Detroit, Lansing, Windsor, and Toledo. The signals are captured from the atmosphere with a master antenna and then retransmitted via cable to the subscribers' sets, which are specially wired for cable reception. On May 27, 1966, the Federal Communications Commission ordered Buckeye to cease and desist from carrying the signal of station WJIM-TV, Lansing, Michigan.[1] FCC regulations[2] prohibit CATV systems operating within one of the one hundred largest markets from extending the signals of distant stations beyond their "Grade B Contour"[3] unless

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[1] 3 F.C.C.2d 798.

[2] 47 C.F.R. § 74.1107.

[3] A "Grade B Contour" is the line representing the service area in which a good picture is available 90 percent of the time at 50 percent of receiver locations. See Sixth Report and Order, Federal Communications Commission, 17 Fed. Reg. 3905, 3915 (1952). A CATV system is deemed to be operating within one of the one hundred largest markets for

the Commission has previously determined in a hearing that such carriage will be "consistent with the public interest and specifically the establishment and healthy maintenance of television broadcast service in the area."[4] Buckeye sought no such determination. Instead, it brought this review proceeding to challenge the Commission's distant-signal rules and the cease-and-desist order issued under them.

The distant-signal rules were first published in the Federal Register on March 17, 1966, as part of the Commission's Second Report and Order on CATV wherein it asserted jurisdiction over all CATV systems and adopted a comprehensive regulatory scheme.[5] The distant-signal rules are applicable to all systems that began carrying a distant signal after February 15, 1966. Buckeye began carrying WJIM-TV on March 16, 1966—the day the system went into operation—which is one month after the cutoff date and one day prior to the publication of the rules in the Federal Register. WJIM-TV is a "distant signal" and Toledo is one of the one hundred largest markets.

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the purpose of the regulation whenever it is located within the Grade A Contour of any television station located in one of these markets. A "Grade A Contour" is the service area in which a good picture is available 90 percent of the time at 70 percent of receiver locations. *Ibid.*

[4] The regulations also provide for a waiver of the rules in certain situations. 47 C.F.R. § 74.1109. The Commission denied Buckeye's petition for a waiver, 3 F.C.C.2d 808 (1966), but Buckeye does not appeal from that denial.

[5] 2 F.C.C.2d 725 (1966). The Commission also adopted, *inter alia*, regulations controlling the degree to which CATV systems can duplicate the programing of local broadcasters, and stipulating the situations in which local broadcast stations must be carried by the systems. We are concerned only with the distant-signal rules, and not with any of the other regulations adopted by the Commission.

(1) A threshold question of first impression is whether the FCC has jurisdiction to regulate those CATV systems which employ no microwave transmission.[6]

The Communications Act, which directs the Commission to provide "a rapid, efficient, Nation-wide and world-wide wire and communication service . . . ,"[7] applies to "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or transmission of energy by radio . . . ."[8] To achieve the goals of the Act, the Commission is directed, *inter alia*, to establish "areas or zones to be served by any [broadcast] station,"[9] to issue broadcast licenses to "provide a fair, efficient, and equitable distribution of radio service" to the states and communities of the United States,[10] and to promulgate rules and regulations to effectuate its responsibilities.[11]

The Commission determined in the Second Report and Order that CATV systems are engaged in "communica-

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[6] Compare our decision in *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 116 U.S.App. D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951 (1963), where we upheld the Commission's power to regulate CATV systems served by microwave through its power to regulate microwave carriers. And see First Report and Order on CATV, 38 F.C.C. 683 (1965), in which regulations applicable to microwave-served systems were adopted.

[7] 47 U.S.C. § 151 (1964).

[8] 47 U.S.C. § 152 (1964).

[9] 47 U.S.C. § 303(h) (1964).

[10] 47 U.S.C. § 307(b) (1964).

[11] See 47 U.S.C. §§ 154(i), 303(f), (r) (1964).

tions by wire" within the meaning of the Act.[12] It had already found that such systems enlarge the number of stations otherwise available to their subscribers, thereby splintering the market, and potentially decreasing audience size and, ultimately, the advertising revenues of local stations.[13] It concluded that further unregulated growth of CATV represents a substantial economic threat to licensed television broadcast stations, and thus to the system of station allocations the Commission has established.

To meet this situation in the major population centers, the Commission promulgated the distant-signal rules, relying on its responsibility to insure "fair and equitable" station distribution by regulating service "areas and zones." The CATV threat in the major markets is especially serious, because large scale CATV operation in these markets might deter and possibly destroy the development of free, nonnetwork UHF stations which, for a variety of reasons, are likely to be economically weak even without CATV competition.[14] Although there is some evidence con-

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[12] 47 U.S.C. § 153(a) (1964). Buckeye does not dispute the Commission's conclusion that since CATV systems transmit "pictures and sounds . . . by aid of wire" and are "instrumentalities . . . [used for] . . . the receipt, forwarding, and delivery of communications . . . incidental to such transmission," they are engaged in wire communication.

[13] See generally First Report and Order on CATV, 38 F.C.C. 683 (1965); *Carter Mountain Transmission Corp.* v. *Federal Communications Commission, supra* note 6.

[14] In large metropolitan areas already served by television stations affiliated with the three major networks, new UHF entrants must offer independent nonnetwork programing. The audience for such programing is limited (according to FCC estimates, about 10 percent of viewers during prime viewing hours), and UHF stations are further handicapped by the fact that many receivers are not equipped for UHF

cerning adverse CATV impact in these markets, the extent of the danger is not yet clear enough for the application of fixed prohibitions. The rules reflect the Commission's decision to examine each situation on an ad hoc basis. We think it has chosen an eminently reasonable course. The growth of CATV is so rapid that, if it is allowed to proceed unabated, harm to the regulatory scheme can occur before the FCC can act.[15] Further, subsequent regulation might disrupt large numbers of CATV systems with heavy capital investment and substantial public reliance on their services. The distant-signal rules afford the Commission an opportunity to determine on a case-by-case basis whether the public interest in the future of communications will be obstructed by each CATV operation.

Buckeye argues, however, that the Commission cannot rest jurisdiction on CATV's close relationship to regulated broadcast stations. It points out that the asserted basis for regulation is Subchapter III of the Communications Act which provides for the licensing of broadcasting,[16]

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reception. This problem has been remedied by congressional passage of legislation designed to allow the FCC to require UHF capability for all commercial receivers. 47 U.S.C. § 303(s) (1964). And see H.R. REP. No. 1559, S. REP. No. 1526, 87th Cong., 2d Sess. (1962). But this legislation, which reflects Congressional concern for the development of UHF independent stations, has not yet fully taken hold. Thus the new UHF entrant may have a difficult time operating at a profit. CATV can compound the problem. Its chief attraction in the markets already possessing full network coverage would be its ability to offer the programs of independent stations. Thus it would splinter the already limited market for nonnetwork programing.

[15] See Second Report and Order on CATV, 2 F.C.C.2d 725, 771-72.

[16] 47 U.S.C. § 301, *et seq.* (1964). The Commission has declined to regulate CATV under the common carrier provisions of Subchapter II. See *Philadelphia Television Broad-*

and that CATV systems are not broadcasters subject to licensing because they do not employ radio frequencies to distribute signals. Relying on *Regents of the University of Georgia* v. *Carroll*, 338 U.S. 586 (1950), Buckeye asserts that the FCC's only permissible function under Subchapter III is licensing of broadcasters, and thus it may not control the signals Buckeye can deliver to its customers. We think this reliance is misplaced.

In *Carroll*, the Supreme Court held that the Commission's duty to effectuate the public interest requirements of Subchapter III "centered" [17] around its licensing power, which does not encompass abridgment of contracts between licensees and third parties. But the Court's view of this limitation was based largely on the agency's lack of authority at that time to issue cease-and-desist orders, against licensees or anyone else, to prevent violations of the Act. Subsequently Congress conferred such authority,[18] which correspondingly expanded the Commission's power to protect the regulatory scheme. We do not have to decide the degree to which *Carroll* may still be viable since we think that, in any event, it does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme.[19]

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casting Co. v. *Federal Communications Commission*, 123 U.S. App.D.C. 298, 359 F.2d 282 (1966).

[17] 338 U.S. at 599.

[18] 47 U.S.C. § 312(b) (1964).

[19] It is clear that a CATV system is more than simply a passive recipient of television signals, indistinguishable from a rooftop antenna; CATV systems engage in commercial retransmission of the signals they receive. We also reject the suggestion that the Commission's powers are rigidly compartmentalized into "licensing" and "public utility regulation" functions. See *Carter Mountain Transmission Corp.* v.

Our view is bolstered by the cases which have recognized implied agency authority to deal with aligned activities which may affect the regulatory system entrusted to the agency. "Congress in passing the Communications Act of 1934 could not . . . anticipate the variety and nature of methods of communication by wire or radio that would come into existence . . . ." In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry."[20] It would "frustrate the purposes for which . . . [the Act] was brought into being [if Congress had attempted] an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency."[21]

We reject Buckeye's further contention that it engages only in intrastate commerce and is therefore exempt from FCC regulation. Although Buckeye and its customers are located in the Toledo area, its facilities are a link in the interstate transportation of television signals. It receives programs which originate outside the state and retransmits them by cable to its customers.[22]

(2) The distant-signal rules are also challenged as an

Federal Communications Commission, supra note 6. Regardless of the label attached to the distant-signal rules, they reflect a reasonable exercise of Commission power to prevent the extension of television signals beyond their predicted range whenever such extension is not in the public interest.

[20] *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission,* 123 U.S.App.D.C. 298, 300, 359 F.2d 282, 284 (1966).

[21] *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943). See also *American Trucking Association* v. *United States,* 344 U.S. 298, 311 (1953) (I.C.C. may regulate practices not mentioned in Act which may directly frustrate the success of the regulatory scheme).

[22] See *Idaho Microwave* v. *Federal Communications Commission,* 122 U.S.App.D.C. 253, 256, 352 F.2d 729, 732 (1965).

illegal restraint on First Amendment rights. It is true that CATV systems disseminate programs carrying a wide range of information. But we think the restraint imposed by the rules is no more than is reasonably required to effectuate the public interest requirements of the Act.[23] As we have pointed out, the rules are not a flat bar against distant-signal importation. The restraint may be only temporary if Buckeye can show that carrying WJIM-TV will not adversely affect broadcasting in Toledo.

Buckeye claims, however, that, as a practical matter, the heavy burden established by the Commission for such hearings makes relief only a remote possibility and thus that the restraint is absolute. Although the regulations are phrased in broad terms, we cannot say that on their face they impose such a heavy burden.[24] And, since Buckeye has not sought any hearing, we cannot know how the Commission will apply them. Buckeye's complaint is therefore premature.

(3) Buckeye also contends that the rulemaking proceedings under review violated the requirements of the Administrative Procedure Act in several respects.

It says first that the Notice of Inquiry issued on April 22, 1965, failed adequately to specify the substance of the proposed rules. We cannot agree. The Notice was issued simultaneously with the FCC's assertion of jurisdiction over CATV systems employing microwave carriers and its

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[23] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27 (1943); *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 116 U.S.App.D.C. 93, 98, 321 F.2d 359, 364, *cert. denied*, 375 U.S. 951 (1963).

[24] A CATV system must show that distant-signal carriage "will be consistent with the public interest and specifically the establishment and healthy maintenance of television broadcasting service in the area." Given the conjecture presently surrounding the question of CATV impact, perhaps these regulations are as specific as possible.

issuance of regulations to deal with them.[25] The Notice sought comments on the Commission's view favoring assertion of jurisdiction over all CATV systems and on its proposal to adopt for such non-microwave systems the "carriage" and "nonduplication" rules it had adopted that day for CATV systems employing microwave carriers. The Notice also discussed "the mushrooming entry of CATV into major centers of population," and the Commission specifically requested comment on a rule that would prohibit extending the signal of any station beyond its Grade B contour into markets that were defined so as to include Toledo.[26]

Buckeye secondly contends that the Notice of Inquiry misled interested parties to believe that further notice and opportunity for comment would precede the adoption of final rules. The Commission did suggest that a further Notice would "in all likelihood" be issued "to afford opportunity for comment on" its proposals. But the Commission also made clear that it desired full comment so as to be in a position to establish rules without further proceedings.[27] Numerous interested parties filed extensive com-

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[25] First Report and Order on CATV, 38 F.C.C. 683 (1965).

[26] See Notice of Inquiry and Proposed Rulemaking, 1 F.C.C. 2d 453, 471-72 (1965). We cannot agree with Buckeye that the failure to mention "grandfather rights" is a fatal defect in the Notice. The Administrative Procedure Act requires only that the notice contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C.A. § 553(b)(3) (1966). See *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App.D.C. 342, 210 F.2d 24 (1954); *Owensboro on the Air, Inc.* v. *United States*, 104 U.S.App.D.C. 391, 262 F.2d 702 (1958), *cert. denied*, 360 U.S. 911 (1959).

[27] The Commission said:

> In the absence of further information, we do not have a sound basis for specific rule proposals. However, in

ments on the rules in question,[28] and there is no evidence or claim that any of them withheld pertinent data or argument in reliance upon the possibility of a future proceeding. And we find no basis for Buckeye's assertion of bad faith on the part of the Commission. We are entirely satisfied that any possible ambiguity in the Commission's statements did not affect the fairness of the proceedings.

Buckeye next complains that, although the Administrative Procedure Act does not require an evidentiary hearing or oral argument,[29] the opportunity should have been

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order to be in a position to take any rulemaking action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indicated above.

* * *

Consideration of nonmicrowave CATV systems is included in order to conserve time and to avoid the necessity for a second proceeding, particularly in the event that no legislation is forthcoming and the comments in this proceeding confirm our initial conclusion that the Commission has present jurisdiction over all CATV systems. Moreover, we believe it appropriate . . . to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not. 1 F.C.C.2d at 476-77.

[28] Sixty interested parties, many of whom also represented other interested persons, filed comments and/or reply comments in this proceeding. See Second Report and Order, 2 F.C.C.2d 789-90 (1966). In addition, the Commission reported receiving a large number of informal comments and letters. *Id.* at 726 n. 2. The views expressed are summarized at *Id.*, pp. 790-93.

[29] The Administrative Procedure Act requires only that interested parties be allowed to submit data and argument "with or without opportunity to present the same orally in any manner.". 5 U.S.C.A. § 553(c) (1966).

given because of the importance of the issues. It does not suggest what arguments and data required such presentation, and why.[30] In these circumstances, we find no basis for disturbing the Commission's discretion to control the course of its own proceedings.[31]

(4) We also reject Buckeye's contention that the distant-signal rules constitute invalid retroactive regulation. Although published in the Federal Register on March 17, 1966, the rules are applicable to all CATV systems that began carrying distant signals after February 15, 1966. The rules do not penalize Buckeye for carrying distant signals during the period prior to their effective date; rather they make carriage of such signals illegal *from and after* the effective date.

The rule is not retroactive,[32] but simply confers "grand-

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[30] See *American Airlines, Inc.* v. *Civil Aeronautics Board*, 123 U.S.App.D.C. 310, 319, 359 F.2d 624, 633, *cert. denied*, 385 U.S. 843 (1966). Buckeye's principal contention seems to be that the numerous conflicting comments submitted made oral argument necessary so that the Commission could clarify and synthesize the written inconsistencies. It seems peculiarly within the Commission's discretion to decide whether it needs oral argument to sort out conflicts in the rulemaking comments. At any rate, the distant-signal rules were promulgated not after conflicts were resolved, but *because of* the Commission's determination that there were questions of CATV impact that could not presently be resolved. Buckeye has failed to show how oral presentation would have supplied answers to these questions.

[31] *Federal Communications Commission* v. *WJR, The Goodwill Station*, 337 U.S. 265 (1949). And see 47 U.S.C. § 154(j) (1964) which authorizes the FCC "to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

[32] Even a rule of retroactive effect is valid if reasonable. See, *e.g.*, *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, No. 19,887, decided May 18, 1967, slip op., pp.

father rights" upon those systems which began carrying distant signals before the regulations were announced. The cutoff date—February 15—is the date of the Commission's first and widely circulated public announcement that it had adopted the distant-signal rules and that they would be applicable to operations thereafter commenced. The Commission sought to avoid unnecessary disruption of the viewing habits of those who had subscribed to CATV prior to the adoption of the regulations. On the other hand, it faced the danger that many new systems, not yet in operation, would begin nominal operations in the major markets to avoid the requirement of a public interest determination and thus destroy the plan.[33]

We think the "grandfather rights" manifested the Commission's "felt need for regulating . . . [CATV], while at the same time . . . satisfied the dictates of fairness by affording sanction for enterprises theretofore established."[34]

8-13. For the reasons discussed *infra*, we find the present rule reasonable.

[33] The Commission has set out an adequate basis for these fears in the Second Report and Order, 2 F.C.C.2d 725, 784-85 (1966), and in its Memorandum Opinion and Order denying motions for a stay of the rules pending decision on petitions for reconsideration. See 3 F.C.C.2d 816, 819-23 (1966). While the Commission could not be certain how many systems would seek to beat the gun, there was evidence that a large number of systems were preparing to begin operations, and that many of them were located in the major markets.

Any date the Commission could have selected would have adversely affected some CATV systems preparing for operation. But those contemplating entering the field have been on notice since April 22, 1965, that the Commission might adopt regulations like the distant-signal rules, and presumably could plan accordingly. And the impact of the Commission's choice of a cutoff date is ameliorated since the affected systems can attempt to show that their importation of distant signals would be consistent with the public interest.

[34] *United States* v. *Maher*, 307 U.S. 148 (1939). We also

(5) Finally, we find no merit in the claims that the Commission unfairly and illegally expedited the cease-and-desist hearing and that it erroneously refused to consider any question at the hearing aside from the narrow one whether Buckeye was operating in violation of the rules. The Commission, relying in part on information developed in the rulemaking proceedings, amply justified its decision to expedite action.[35] And, since the record was not closed until Buckeye had indicated that it would not introduce evidence directed to the question whether carriage of WJIM was a violation, Buckeye was not prejudiced by the expedited procedure followed. Moreover, many of the issues Buckeye sought to ventilate at the cease-and-desist hearing were considered by the Commission in the Second Report and Order and in its denial of Buckeye's request for waiver of the distant-signal rules.[36]

Affirmed.

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reject Buckeye's claim that the FCC lacked sufficient "good cause" to make the rule effective on March 17, the day of publication in the Federal Register, rather than waiting the full 30 days normally required by the Administrative Procedure Act, 5 U.S.C.A. § 553(d) (1966). Since the cutoff date had been set at February 15, the Commission properly sought to minimize the disruption in service to CATV subscribers that would result when the rules became effective,

[35] See 3 F.C.C.2d 798, 801-05 (1966).

[36] 3 F.C.C.2d 808 (1966). Consequently our decision in *C. J. Community Services* v. *Federal Communications Commission*, 100 U.S.App.D.C. 379, 246 F.2d 660 (1957), is inapplicable. And see *Booth American Co.* v. *Federal Communications Commission*, —— U.S.App.D.C. ——, 374 F.2d 311 (1967).

APPENDIX E

COMMUNICATIONS ACT OF 1934

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to

persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * *

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

SEC. 4(i). The Commission may perform any and all acts, make such rules and regulations, and issue

such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in

that behalf granted under the provisions of this Act.

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

* * * * *

(h) Have authority to establish areas or zones to be served by any station;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or many hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

SEC. 307(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

SEC. 312(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

APPENDIX F

§§ 74.1107 AND 74.1109 OF THE COMMISSION'S RULES

47 CFR 74.1107 AND 74.1109

§ 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures

(a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal

or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter.

The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: *Provided, however,* That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section: *And provided further,* That no CATV system located in the 100 largest television markets,

which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66–220, pars. 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permit-

tee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorted time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

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APPENDIX G

CATV CASES PENDING IN THE COURTS OF APPEALS [1]

A. IN THE DISTRICT OF COLUMBIA CIRCUIT

1. *Cedar Rapids Television Company (KCRG–TV) and WMT–TV, Inc. (WMT–TV)* v. *Federal Communications Commission and the United States of America*, No. 20783.
2. *Mobile Video Tapes, Inc.* v. *Federal Communications Commission*, No. 20797.
3. *Indiana Broadcasting Corporation* v. *Federal Communications Commission and United States of America*, No. 20833.
4. *Indiana Broadcasting Corporation (WANE–TV)* v. *Federal Communications Commission and United States of America*, No. 20990.
5. *Channel 9, Syracuse, Inc.* v. *Federal Communications Commission*, No. 20843.
6. *Channel 9, Syracuse, Inc.* v. *Federal Communications Commission and United States of America*, No. 20915.
7. *Hubbard Broadcasting Inc.* v. *Federal Communications Commission*, No. 20924.
*8. *Valley Vision, Inc.* v. *Federal Communications Commission*, No. 21063.

(NOTE.—Items 3 and 4 have been consolidated, as have Items 5 and 6.)

[1] Cases marked with an asterisk raise the jurisdictional issue.

B. IN THE FIRST CIRCUIT

9. *Van Buren TV Cable Co., Inc.* v. *Federal Communications Commission and United States of America,* No. 6897.
10. *Presque Isle TV Co., Inc., et al.* v. *Federal Communications Commission and United States of America,* No. 6896.

(NOTE. Items 9 and 10 have been consolidated.)

C. IN THE THIRD CIRCUIT

11. *Titusville Cable Co.* v. *Federal Communications Commission and United States of America,* No. 16559.
*12. *Byron McCracken, Jr., d.b.a. South Side Cable Company* v. *Federal Communications Commission and United States of America,* No. 16650.

(NOTE.—A motion has been filed seeking to consolidate Items 11 and 12.)

D. IN THE SIXTH CIRCUIT

13. *Telerama, Inc.* v. *Federal Communications Commission and United States of America,* No. 17311.

E. IN THE EIGHTH CIRCUIT

*14 *Black Hills Video Corp. and Midwest Video Corp.* v. *Federal Communications Commission and United States of America,* No. 18052.
*15. *Midwest Video Corporation and Black Hills Video Corp.* v. *Federal Communications Commission,* No. 18348, formerly District of Columbia Court of Appeals No. 20264.

*16. *Midwest Television, Inc.* v. *Federal Communications Commission and United States of America,* No. 18481 formerly District of Columbia Court of Appeals No. 19976.

*17. *Midwest Television, Inc.* v. *Federal Communications Commission and the United States of America,* No. 18482 formerly District of Columbia Court of Appeals No. 20021.

*18. *Alice Cable Television Corporation, A Subsidiary of the Jerrold Corporation* v. *Federal Communications Commission and United States of America,* formerly No. 18793.

*19. *Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp.* v. *Federal Communications Commission and United States of America,* No. 18839.

*20. *Buckeye Cablevision, Inc.* v. *Federal Communications Commission and United States of America,* No. 18813.

(NOTE.—All of the foregoing have been consolidated.)

F. IN THE NINTH CIRCUIT

*21. *Valley Vision, Inc.* v. *Federal Communications Commission and United States of America,* No. 21870.

*22. *Valley Vision, Inc.* v. *Federal Communications Commission and United States of America,* No. 21869.

G. IN THE TENTH CIRCUIT

23. *Conley Electronics Corporation d/b/a Teleprompter of Liberal, Inc.* v. *Federal Communications Commission and United States of America,* No. 9503.

U.S. GOVERNMENT PRINTING OFFICE: 1967 O—269-328

SUPREME COURT, U. S.
No. 428
JUL 27 196
JOHN F. DAVIS, CLE

Supreme Court of the United States

OCTOBER TERM, 1967

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC., and JACK O. GROSS, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERNEST W. JENNES
CHARLES A. MILLER
701 Union Trust Building
Washington, D.C. 20005
Attorneys for Petitioners

Of Counsel:
COVINGTON & BURLING
701 Union Trust Building
Washington, D.C. 20005

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Supreme Court of the United States

OCTOBER TERM, 1967

No.

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC., and JACK O. GROSS, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 28, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A of the petition of the United States.[1]

[1] The United States and the Federal Communications Commission have petitioned together in No. 363, Oct. Term, 1967, for certiorari to review the same decision involved in this petition. The material printed in the appendices to the petition of the United States will be designated herein as "U.S. App." References designated "R." refer to the Appendix of the United States and Commission as respondents in the Court of Appeals, 10 copies of which have been filed in this Court.

The memorandum opinion and order of the Federal Communications Commission, reported at 4 F.C.C. 2d 612, appears at Appendix C of the petition of the United States.

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1967, and appears at Appendix B of the petition of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1964) and 28 U.S.C.A. § 2350 (1966 Supp.).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has authority under the Communications Act of 1934 to adopt rules regulating directly the operations of non-microwave-served community antenna television (CATV) systems.

2. Whether such authority encompasses a rule designed to preserve the status quo by preventing expansion of service by such CATV systems pending the Commission's evidentiary proceeding to determine whether the expansion would be contrary to the public interest.

STATUTES AND RULES INVOLVED

Section 1, 2(a), 3(a), 3(b), 3(e), 4(i), 303(f), 303(h), 303(r), 303(s), 307(b), 312(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152(a), 153(a), 153(b), 153(e), 154(i), 303(f), 303(h), 303(r), 303(s), 307(b), 312(b) (1964), all of which are set forth in Appendix E of the petition of the United States except for Section 3(b) which appears in Appendix A of this petition.

Sections 74.1107 and 74.1109 of the Rules of the Federal Communications Commission, 47 C.F.R. 74.1107 and .1109 (1967), which are set forth in Appendix F of the petition of the United States.

STATEMENT

This case involves the continuing effort of the Federal Communications Commission to establish and maintain in the United States a system of television broadcasting utilizing a large number of local stations rather than a handful of superstations. This policy, designed to assure widespread free television and a balance between national and locally oriented programming, has been upheld by the courts and approved by the Congress. The most recent threat to fulfillment of the policy has been posed by community antenna television (CATV).

CATV systems are designed to capture television signals from another city that distance or other natural conditions would prevent television sets from receiving adequately or at all in the CATV-served community. After being collected, often by a master antenna located at high elevation, and sometimes after being relayed by microwave radio over considerable distances, the signals are amplified so that coaxial cable can carry them into the community and then into individual homes where a line is hooked directly into the television set. The systems, which are not subject to licensing by the Commission as radio stations, "consist of sophisticated, complex, extremely sensitive, highly expensive equipment, especially constructed and designed" for CATV operations. *United Artists TV, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177, 195 (S.D.N.Y. 1966), *aff'd*, ___F.2d___(2d Cir. 1967).

Although CATV first made its mark bringing two or three stations into communities having little or no television service available "off the air," many systems are now being es-

tablished or proposed to carry numerous stations from cities like New York and Los Angeles into large and small communities throughout the country which are or would otherwise be amply served by a number of local or neighboring stations. These local stations must be sustained by advertising, the level of which depends upon each local station retaining an adequate viewing audience. By bringing distant signals into a community CATV systems splinter or fragment this audience requisite to the survival of existing local stations and the development of new ones.

Concern with this growing threat to the viability of existing and proposed local stations – especially to less firmly rooted independent ultra-high frequency (UHF) stations – led the Commission, after extensive rulemaking proceedings, to adopt comprehensive rules to regulate all CATV systems, whether or not served by microwave.[2] Several of the provisions, central to the regulatory scheme, relate to CATV carriage of distant signals. These provide that no new CATV system may carry into the Grade A contour of any local station in the 100 largest television markets the signal of any "distant" station (*i.e.*, one whose Grade B contour does not reach the community)[3] except upon a showing in an evidentiary hearing that such carriage is consistent with the public interest and, specifically, the establishment and healthy maintenance of local television broadcast service. 47 C.F.R. § 74.1107(a) (1967). Under a "grandfather" clause, signals being carried by existing systems on February 15, 1966, are excepted from this limitation. It does, however, apply to any geographic expansion by such sys-

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[2]These rules, 47 C.F.R. §§ 74.1101 to .1109 (1967), are set forth in relevant part in Appendix F of the petition of the United States.

[3]The Grade A contour of a station delimits the area along whose outer perimeter good television reception may be expected 90 percent of the time at the best 70 percent of the locations. The Grade B contour is the line at which good reception may be expected 90 percent of the time at the best 50 percent of the locations.

tems where the public interest so requires; and temporary relief against expansion pending a hearing on the public interest question is authorized. 47 C.F.R. § 74.1107(d) (1967). Where special circumstances warrant, these restrictions on carriage of distant signals may be waived or augmented or applied outside the 100 largest markets. 47 C.F.R. §§ 74.1107(c), 74.1109(a) (1967).

Pursuant to these rules, petitioner Midwest Television, Inc., licensee of a television station in San Diego, California,[4] invoked the Commission's rules against respondents, four interrelated companies involved in CATV operations in San Diego. Affidavits and other submissions by petitioners showed the following: Respondents, possessing grandfather rights under the CATV rules, were importing into San Diego on a rapidly expanding basis the signals of most or all of Los Angeles' seven commercial VHF television stations. San Diego, fifty-fourth largest television market in the country, was already well served by four local and neighboring English-language television stations and one Spanish-language station and there was a prospect of two or three additional stations. Further significant expansion of respondents' CATV systems would fragment the viewing audience to the point of imperiling the ability of the existing stations to operate in the public interest and of unborn stations to come into being.

Accordingly, the Commission was requested to restrain, pendente lite and then permanently after hearings, any further expansion of respondents' CATV systems so far as they carry Los Angeles signals. After respondents replied through

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[4] Midwest Television, Inc. operates a network affiliate, a very high frequency (VHF) station. A second petitioner, San Diego Telecasters, Inc., operates an unaffiliated UHF station, and the third, Jack O. Gross, holds a permit from the Commission to construct another UHF station. All three petitioners intervened in the proceeding when it reached the Court of Appeals.

pleadings, affidavits and other documents, the Commission ruled that there existed "a classic case" for a full evidentiary hearing on CATV's impact on San Diego television and designated the case for hearing. 4 F.C.C. 2d at 620 (U.S. App. C, p. 48). The Commission found interim relief to be essential, noting the "impracticability of withdrawing [CATV] service, once established, because of its disruptive effect," and the "strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted." 4 F.C.C. 2d at 621 (U.S. App. C., p. 50). It therefore ordered respondents not to expand their systems, with certain exceptions, by adding new subscribers to receive Los Angeles signals pending the outcome of the ordered evidentiary hearing.[5]

Respondents appealed the Commission's grant of interim relief to the Court of Appeals for the Ninth Circuit.[6] After effecting a minor modification in the Commission's interim order pending review, the Ninth Circuit ruled that the Commission lacked statutory authority to issue the order because "sections 4(i) and 303(r) [of the Communications Act, 47 U.S.C. §§ 154(i), 303(r) (1964), conferring general rulemaking authority upon the Commission] are limited to the scope of the Commission's licensing authority." (U.S. App. A, p. 29). Accordingly, the court set aside the Commis-

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[5] Expansion to carry signals other than those of Los Angeles stations was not affected by the order at all. As to Los Angeles signals, under the Commission's order new lines carrying them could be built and new subscribers added to receive them in designated geographic areas in which the systems had been operating on the grandfather clause date; the Ninth Circuit further liberalized the order by allowing new subscribers to be added to any trunk and feeder lines existing at the date of the order.

[6] Jurisdiction of the Court of Appeals was founded upon Section 402(a) of the Communications Act, 47 U.S.C. § 402(a) (1964), and the Judicial Review Act of 1950, 5 U.S.C. §§ 1031-42 (1964).

sion's grant of interim relief but stayed its own mandate pending certiorari proceedings. Mr. Justice Brennan subsequently amended the stay of mandate to permit the United States and the Commission further time to file their petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. In Interpreting the Communications Act, the Lower Court Decision Has Created a Conflict in the Circuits and Seriously Misconstrued this Court's Opinion in *Regents v. Carroll*, 338 U.S. 586 (1950).

The Court of Appeals' decision held that the Commission lacked power to issue interim orders, upon notice and opportunity for written arguments and affidavits, to limit expansion of existing CATV systems pending full evidentiary hearings. This position would also imperil the automatic limitations, pending Commission action, on new CATV systems and carriage of new distant signals by existing CATV systems since those limitations rest on the same statutory foundation. Unless temporary limitations on CATV distant signal carriage can be provided, CATV operations may become permanently entrenched while the Commission decides whether to hold hearings and while hearings actually proceed. Thus the lack of temporary limitations would jeopardize the Commission's entire program for regulation of CATV distant signal carriage. Moreover, the underlying rationale of the court's ruling is that the Commission utterly lacks statutory authority to regulate CATV systems directly, for the court stated that the Commission's rulemaking power does not extend beyond station licensees, and CATV systems are not licensed as stations by the Commission.[7] In either event, the grant of certiorari is justified because the decision gives rise to

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[7] In an order dated June 29, 1967, in Valley Vision, Inc. v. United States, Nos. 21869-70, the Ninth Circuit implied a broad construction of the present decision by citing it as the sole reason for temporarily staying a cease and desist order enforcing the CATV rules.

a conflict among the circuits and is based on a fundamental misreading of an opinion of this Court.

The lower court decision is in square conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Buckeye Cablevision, Inc. v. FCC*, No. 20274 (June 30, 1967), not yet reported but reprinted in Appendix D of the petition of the United States. In the present case the court stated that the Commission's regulatory power does not extend beyond licensees to reach CATV companies engaged in retransmission of television signals by wire. In *Buckeye*, the Commission had found a CATV company to be carrying distant signals into a community in violation of the Commission's CATV rules and had issued a cease and desist order against the company under Section 312(b) of the Communications Act. 47 U.S.C. § 312(b) (1964). In rejecting on appeal the company's contention that the Act granted no authority to regulate CATV systems directly, the District of Columbia court relied on the precise statutes and reasoning rejected in this case by the Ninth Circuit Court of Appeals.

The provisions of the Act expressly apply to "all interstate ... communication by wire or radio" and "all persons engaged . . . in such communication," § 2(a), 47 U.S.C. § 152(a) (1964), and *Buckeye* upheld the Commission's conclusion that CATV systems fall squarely within this category as defined by statute and case law.[8] The Act mandates the Commission to provide "a rapid, efficient, Nation-wide . . . wire and communication service," and, *inter alia*, to establish "areas or zones to be served by any [broadcast] station" and to issue broadcast licenses "to provide a fair, efficient, and equitable distribution of radio service" to states and local communities. §§ 1, 303(h), 307(b), 47 U.S.C. §§ 151, 303(h), 307(b) (1964). The court in *Buckeye* found that,

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[8] §§ 3(a), 3(b), 3(e), 47 U.S.C. §§ 153(a), 153(b), 153(e) (1964); Idaho Microwave, Inc. v. FCC, 352 F.2d 729 (D.C. Cir. 1965). It does not appear that respondents seriously contend otherwise.

to meet these responsibilities in the face of the threat posed by CATV, the Commission had pursued "an eminently reasonable course" (U.S. App. D, p. 72), properly exercising its statutory authority to promulgate rules and regulations necessary to execute its functions. §§ 4(i), 303(f), 303(r), 47 U.S.C. §§ 154(i), 303(f), 303(r) (1964).

The District of Columbia Circuit explicitly rejected the CATV company's argument, which underlies the decision of the Ninth Circuit in this case, that "the Commission's powers are rigidly compartmentalized into 'licensing' and 'public utility regulation' functions," neither of which encompassed CATV. (U.S. App. D, p. 73, n. 19). The court pointed to settled decisions, construing the Communications Act as well as other regulatory statutes, that agencies are empowered to deal with aligned activities that may affect the regulatory scheme without possessing detailed statutory directions. *E.g., American Trucking Ass'ns v. United States*, 344 U.S. 298, 311 (1953). In sum, *Buckeye* squarely conflicts with the Ninth Circuit decision in this case.[9]

The Ninth Circuit's references to the cease and desist power and its procedures suggest the decision would in all events require that the Commission conduct a full evidentiary hearing before limiting the spread of CATV systems. This position, no less erroneous than the broader one, brings the Ninth Circuit into conflict with decisions of both the Tenth and District of Columbia Circuits upholding agency power to take temporary action under broad rulemaking authority.

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[9]The conflict is in no way lessened by the Commission's reliance in *Buckeye* on its power to issue cease and desist orders against violators of its rules. Section 312(b), 47 U.S.C. § 312(b) (1964). The Commission's determination to proceed, as in the present case, upon a particularized finding that the public interest is threatened rather than through a blanket restriction enforceable by cease and desist orders, as in *Buckeye*, can hardly diminish its substantive jurisdiction over CATV.

The Tenth Circuit decision is *Amerada Petroleum Corp. v. FPC*, 293 F.2d 572 (1961), *cert. denied*, 368 U.S. 976 (1962), upholding the Federal Power Commission's temporary restraint on the filing of a new gas rate schedule while a previously filed schedule was under investigation. There being no explicit grant of such power, the court relied importantly on the grant in Section 16 of the Natural Gas Act of authority to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as [the FPC] may find necessary or appropriate" to carry out the Act's provisions. 15 U.S.C. § 717*o* (1964). This language bears a striking resemblance to Section 4(i) of the Communications Act which authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (1964).

The District of Columbia Circuit has similarly relied on general grants of authority in regulatory statutes to allow exigent temporary action not authorized in specific terms. For example, *R. A. Holman & Co. v. SEC*, 299 F.2d 127, 132 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962), relying in part on the "broad rule-making powers" of the Securities and Exchange Commission, sustained its power to suspend pending a hearing on various charges a broker-dealer's privilege to underwrite exempted securities.[10]

The unusually broad general grant of authority in the Communications Act can hardly deserve a more grudging

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[10]This stay effectively deprived the broker-dealer of part of his going business apparently without any chance to refute the charges, while the present FCC order merely stays *expansion* of the CATV systems in certain respects and issued only after notice and submission of written statements, affidavits and documents by both sides. Other District of Columbia Circuit cases following *Holman*'s approach are Public Serv. Comm'n v. FPC, 327 F.2d 893 (1964) (Natural Gas Act), and Niagara Mohawk Power Corp. v. FPC, No. 19887 (May 18, 1967) (Federal Power Act).

interpretation than the Natural Gas and Securities Acts' provisions when this court has itself reiterated that Congress "gave the [Federal Communications] Commission not niggardly but expansive powers." *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

Certiorari is additionally warranted to review the Ninth Circuit decision because it rests principally upon a complete misconstruction of this Court's opinion in *Regents v. Carroll*, 338 U.S. 586 (1950), whose language the Court of Appeals found "guided" its "resolution" of the present case. (U.S. App. A, p. 27). In *Carroll*, the FCC declined to renew a license until the station licensee repudiated a contract with a non-licensed company formerly managing the station. After the licensee repudiated the agreement, the Supreme Court upheld a state court award of damages against it for breach of the contract. The opinion stated that the Commission's general power to fix necessary "conditions" was to be construed in connection with its licensing power and the conditions "cannot directly affect the applicant's responsibilities to a third party . . . ." 338 U.S. at 600.

The management company in *Carroll* was treated as a private concern with no status under the Act. The Court's general language relied on by the Ninth Circuit was addressed to this context of facts. As *Buckeye* correctly declared, *Carroll* "does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations . . . ." (U.S. App. D, p. 73.).[11] The Ninth Circuit has extended *Carroll* to limit or deny the Commission authority over companies engaged in interstate "communication by wire or radio" which are explicitly stated to be with-

[11] The District of Columbia Circuit in *Buckeye* also questioned whether *Carroll* would be followed today even on its own facts in light of the subsequent amendment of the Communications Act to give the Commission power to issue cease and desist orders against "any person" violating the Act or regulations under it. § 312(b), 47 U.S.C. § 312(b) (1964).

in the purview of the Act. The extension is a giant one meriting prompt correction by this Court.

II. The Questions Presented by this Case Are of Paramount Importance to Effective Regulation of Television in the Public Interest in Accordance with Congressional Policy

Quite apart from the conflict in the circuits and the misreading of an opinion of this Court, the present case deserves review because of the vast and detrimental impact it threatens to have upon the effective regulation not merely of CATV but of television broadcasting itself. Whether read broadly or narrowly, the lower court decision construes the Communications Act in a fashion that imperils the long-standing national policy of fostering locally based television broadcasting service and the more recent manifestation of that policy in Congressional and Commission efforts to promote the growth of UHF broadcasting.

The Commission's program to achieve a system based on local television broadcast outlets dates back to the first days of regulation of the television industry. In 1952, the Commission adopted its Table of Assignments allocating channels to individual communities across the country and limiting their tower heights and transmitter power to circumscribe their range and prevent interference. This Table represented the Commission's determination to shape the growth of television along lines deemed most consonant with the public interest, defined by Congress as "a fair, efficient, and equitable distribution of radio service" to all of the states and local communities. § 307(b), 47 U.S.C. § 307(b) (1964). In framing the Table of Assignments, the Commission rejected a plan to maximize national television coverage through the use of superpower stations. Instead, it chose to balance the nationally oriented programming, available through networks and other national program distributors, by providing for numerous local and area television stations that could tailor their programs to local needs and interests and serve as outlets for local self-expression.

The decision to adopt this balanced approach, followed ever since by the Commission, was sustained by the courts, *e.g., Logansport Broadcasting Corp. v. United States,* 210 F.2d 24 (D.C. Cir. 1954), and sanctioned by Congress when it enacted the All-Channel Receiver Law in 1962. See H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962); S. Rep. No. 1526, 87th Cong., 2d Sess. 5-7, (1962). This legislation, Act of July 10, 1962, 76 Stat. 150, adding Section 303(s) to the Communications Act, took the unusual step of empowering the Commission to require that new television sets be built to receive UHF as well as VHF stations. The expressed aim was to broaden television service by making it practicable to develop for local use the UHF channels until then both numerous and vacant and not receivable on standard television sets.

CATV seriously threatens these policy goals of the Commission and Congress when, as indicated earlier, it fragments local television audiences by importing numerous outside signals into the community. As the available local audience is divided into ever smaller segments, the ability of local stations to support themselves on advertising revenues plummets and their survival is jeopardized. Even among those stations not eliminated outright, the losses work to impair the quality of the programming and forestall improvement. Prospective local stations are discouraged or prevented from going on the air.

In the end, the area which began with a balance and choice between local and national television programming can find national or huge metropolis television piped in by CATV alone available. Additionally, in the absence of local broadcast stations, the viewer in the community must pay CATV installation and subscription fees, assuming he can afford them, to receive television service once available for free. And for outlying areas, once covered by local stations, there may be no television at all because sparse pop-

ulation makes it uneconomical for CATV systems to extend their lines so far.[12]

The Commission has met this challenge to its program in a highly restrained manner. It took no action at all until voluminous and comprehensive comments were solicited and considered. It declined to ban CATV distant signal carriage outright in areas already directly served by television broadcast stations although this course had much to commend it. Instead, it promulgated its present rules allowing CATV to bring distant signals into a community if, after its procedures are invoked, the Commission finds this to be consistent with the public interest. CATV systems already in operation at the date of the new rules are allowed to continue and they are restrained from expanding further only if the public interest calls for a halt pending a hearing or after Commission consideration. In the present instance, for example, the partial limit on expansion came only after affidavits and other documents demonstrated the severe threat CATV expansion posed to local television, present and proposed, in the particular context of the San Diego area.

If the Ninth Circuit decision were the law, the entire carefully designed program of the Commission could be undone and the Commission and local television broadcast service left helpless before CATV. On this score, it matters not whether the Ninth Circuit's opinion is read broadly or narrowly. Obviously the former is calamitous, for it would mean that the Commission has no direct authority over CATV. But the same practical result could be wrought if the Commission could not maintain the status quo and thereby prevent CATV distant signal entrenchment before the public interest could be determined in particular situations. The practical outcome is likely to be the same be-

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[12] The potential adverse impact on local television, especially upon UHF broadcasting which has only begun to take hold, is described and documented at length in the Commission's Second Report and Order, 2 F.C.C.2d 725, 770-80 (1966) (R. 94-104).

cause, as the Commission stated in its report issuing the CATV rules:

> "Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation . . . . " 2 F.C.C. 2d at 782 (R. 106).

The disruption, once the capital investment in new CATV lines and equipment has been made, individual sets wired in thousands of homes, and viewing habits altered, is easy enough to picture. What should also be borne in mind is that during the interim period, necessarily drawn out in some cases, unchecked CATV expansion may doom irrevocably one or more present or potential local stations that could have been saved if a delay had been effected pending Commission consideration of the public interest.

The scope of the basic questions presented goes far beyond the present case, and the area is one that promises to spawn litigation and conflicts for some time to come absent a decision by this Court. The CATV distant signal rules apply automatically to systems operating in the 100 largest television markets in the United States, areas encompassing in the aggregate 90 percent of the total population. 2 F.C.C. 2d at 783 (R. 107). In each of these markets there may be numerous CATV systems proposed or in operation; indeed, in the San Diego community there are nearly half a dozen actually in operation. In early 1966, the number of operating systems alone was approximately 1,600, 2 F.C.C. 2d at 771-72 (R. 95-96), with thousands more proposed, and systems once established can expand with extreme speed. Signals are now sometimes brought from hundreds of miles away and the number of channels carried is steadily being increased, all of which contributes further to the audience fragmentation and the danger to local television.

Television occupies a major role in American society and the economic life of the nation. Any decision cutting deep-

ly into established Commission and Congressional policies to guide television's development deserves review by reason of its singular importance. Certainly the test of importance is met by the present decision which could move the country far closer to the disadvantages and dangers of over-centralized communications media. For the sake of CATV itself as well as local television, the ground rules should be settled before it is too late, and quantities of needless litigation pretermitted. The significance of the issues presented warrants review of the decision of the Ninth Circuit Court of Appeals.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERNEST W. JENNES
CHARLES A. MILLER
701 Union Trust Building
Washington, D.C. 20005
Attorneys for Petitioners
Midwest Television, Inc.
San Diego Telecasters, Inc.
Jack O. Gross

July, 1967.

Appendix A

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 et seq. (1964):

Sec. 3. For the purposes of this Act, unless the context otherwise requires –

* * *

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

SUPREME COURT, U. S.

AUG 26 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 363

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELE-
CASTERS, INC. and JACK O. GROSS,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP. IN OPPOSITION

FRANK U. FLETCHER
ROBERT L. HEALD
EDWARD F. KENEHAN

FLETCHER, HEALD, ROWELL,
KENEHAN & HILDRETH
1023 Munsey Building
Washington, D. C. 20004

Counsel for Mission Cable TV, Inc.
Pacific Video Cable Co., and
Trans-Video Corp.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 363

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELE-
CASTERS, INC. and JACK O. GROSS,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP. IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App. A. pp. 21-30)[1] is unreported. The memorandum opinion and order of the Federal Communications Commission (App. C. pp. 33-65) is reported at 4 F.C.C.2d 612.

[1] References in this brief to the Appendixes in the Government's petition for writ of certiorari will be identified as "App. A. pp. ".

JURISDICTION

The judgment of the court of appeals (App. B, pp. 31-32) was entered on April 28, 1967. By order of this Court, a petition for certiorari had to be filed on or before July 13, 1967, if the mandate of the court of appeals was to be stayed. The petition for certiorari by Midwest was filed on July 27, 1967. By order of this Court, Respondent's oppositions to both petitions were to be filed on or before August 26, 1967. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §§ 1254(1) and 2350.

QUESTION PRESENTED

Respondents believe that the sole question presented is essentially a very narrow one, namely: Does the Federal Communications Commission have the power to issue a temporary stay to maintain the *status quo* pending a hearing to determine if a permanent stay should be issued or other relief granted, except as specifically authorized by Congress?

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(e), 4(i), 204, 301, 303(f), 303(h), 303(r), 303(s), 307(b), 312(b) and 312(c) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152(a), 153(a), 153(e), 154(i), 204, 301, 303(f), 303(h), 303(r), 303(s), 307(b), 312(b) and 312(c) all of which are set forth in Appendix E of the Government's petition except for Sections 204 and 312(c) which appear as Appendix A of this Brief.

STATEMENT

Respondents adopt the Statement by Petitioners, United States of American and Federal Communications Commission, except for the last paragraph on page 10 of their petition. In lieu thereof, Respondents submit the following paragraph:

Respondents petitioned the court of appeals for review of the interim restrictions, contending that temporary relief of this kind is not authorized by the Communications Act.[2] The court of appeals set aside the Commission's order insofar as it granted interim relief, expressly stating that it was not deciding any of the other questions presented (App. A, p. 29). Specifically, the court below concluded and held that Sections 4(i) and 303(r) of the Communications Act [47 U.S.C. 154(i) and 303(r)],[3] the only sources of authority relied on by the Commission, do not empower the Commission to temporarily restrain or limit Respondents' delivery of Los Angeles television signals to their customers in the San Diego area.

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[2]In addition, Respondents, Trans-Video, Mission and Pacific urged, *inter alia*, that the Commission lacked jurisdiction to regulate CATV systems; that its regulations violated the First Amendment; and that the rule invoked by the Commission was invalid because it was adopted without adequate notice.

[3]In the paragraphs that follow, references to Sections of the Communications Act are not specifically related to the United States Code. It should be noted, however, that Sections 1 through 4 of the Act are Sections 151 through 154 of the Code and all other Sections are identically numbered in both the Act and the Code.

ARGUMENT

In effect, the United States Court of Appeals for the Ninth Circuit has concluded that the Federal Communications Commission may not issue a temporary stay in the nature of a restraining order because Congress has not given the Commission the required statutory authority to do so. In so holding, the court found that such authority did not flow from either Section 4(i) or Section 303(r) of the Communications Act of 1934, as amended, the only sources of authority upon which the Commission relied.

To be more precise, the extent of the holding of the court of appeals is that the Federal Communications Commission not only lacks the authority to issue a temporary stay in connection with a non-licensed activity such as CATV, but it also lacks the authority to temporarily stay the activities of one of its licensees. The court below explained its position in this regard by referring to the authority of the Commission to issue cease and desist orders which, it pointed out, Congress intended to limit to the scope of the Commission's licensing authority. The court then correctly rationalized that Sections 4(i) and 303(r) of the Act do not empower the Commission to issue stays against licensees since, if they did, Congress would have been duplicating an already existing power when, in 1952, it gave the Commission the power to issue cease and desist orders. It follows, of course, that, if Sections 4(i) and 303(r) do not empower the Commission to stay activities of licensees, they do not empower it to temporarily stay the activities of non-licensees such as CATV systems. The decision, which Petitioners now urge this Court to review, holds nothing more and, in so holding, it is unquestionably correct.[4]

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[4]The opposition of Respondent, Southwestern, demonstrates in greater detail the validity of the decision below. Respondents, Mission, Pacific Video and Trans-Video, adopt and support this argument.

Petitioners, however, would have it appear that the decision below is one of far reaching significance, namely, that it determines the Commission's lack of authority insofar as any regulation of CATV systems is concerned. Obviously, the decision of the court below did nothing of the kind. It merely correctly held that the Federal Communications Commission has no statutory authority to temporarily stay or restrain Respondents' CATV activities pending a hearing looking toward a decision with respect to those activities.

Whether, and to what extent, the Federal Communications Commission may regulate CATV systems and their activities is a question the answer to which depends on many more factors and considerations than were considered by the court below, and it is more than apparent that the decision below does not reach that question. In support of its authority to temporarily stay Respondents' lawful activities, the Commission relied solely on Sections 4(i) and 303(r) of the Communications Act, and indeed there are no other provisions of the Act on which it could rely. On the other hand, in support of its authority to regulate CATV systems, the Commission relies primarily on Section 307(b) of the Act and, in addition, contends that the rules it has adopted are proper implementations of Sections 1, 2 and 303(h) and (s) of the Act. The Commission's *Second Report and Order*, 2 F.C.C.2d 725, 788, also refers to Sections 308 and 309 of the Act. Frankly, it borders on the ridiculous to say that the decision below, holding only that Sections 4(i) and 303 (r) of the Communications Act do not empower the Commission to issue temporary restraining orders, also determines the extent of the Commission's authority, if any, with respect to CATV systems.

In addition, the impact of the decision is, for all practical purposes, limited to the San Diego area and is of no significance insofar as the spread of CATV systems is concerned.[5]

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[5] Even in the San Diego area the Ninth Circuit decision will have little, if any, impact on the further development of either UHF or VHF television. The concern there is that the availability of Los Angeles television signals and programs to San Diego residents will

Respondents emphasize again that the decision below holds only that the Federal Communications Commission is not empowered to issue temporary restraining orders, and even the Commission recognizes that the only use it would make of such power—if it had it— would be to maintain the *status quo* pending consideration and disposition of a request by an interested party, i.e., a television broadcast station, for relief above and beyond that provided by established rules and regulations of the Commission. To date, to Respondents' knowledge, there have been only three other stays granted, i.e., Buffalo, New York, (7 Pike and Fischer, R.R.2d 370), the Lexington, Kentucky, area (8 Pike and Fischer, R.R.2d 1092) and the Great Bend, Kansas, area (9 Pike and Fischer, R.R.2d 482). Insofar as Respondents can determine, almost all of the Commission proceedings against CATV systems throughout the country involve violations of the Commission's Rules and Regulations. Such proceedings are being successfully prosecuted under the provisions of Sections 312(b) and (c) of the Communications Act. Furthermore, Respondents believe that there are very few, if any, potential situations with respect to which temporary stays will be requested or needed to maintain a *status quo*.

Despite the obvious limited need of the Commission for the power to issue temporary restraining orders, Petitioners contend that the Ninth Circuit decision presents a question of "far-reaching legal and practical importance" or is of

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so affect the ability of San Diego stations to earn revenue that they cannot provide a desired standard of local public service programming and that those residents who cannot afford CATV connections might perhaps be left with an inferior program service. This is an old problem in San Diego because many residents of the area have received, and continue to receive, the signals of Los Angeles stations by installing tall, costly, and unsightly, albeit effective, rooftop antennae. It is a fact of life, surely recognizable by this Court, that if the residents of the San Diego area can obtain the type and quality of program service they desire from the local San Diego stations (VHF or UHF), they will neither install expensive outdoor antennae nor pay for CATV connections.

"paramount importance" since, among their other allegations, it ". . . unduly restricts the Commission's ability to carry out its congressionally prescribed function under the Communications Act." Or as Petitioner, Midwest, puts it, the result would be calamitous if the Commission could not maintain the "status quo" pending a hearing.

It is respectfully submitted that such predictions are overdrawn, without basis in fact or law, and are simply the result of the Commission's desire to be free from the equitable and legal restrictions and burdens that should limit the power of an administrative agency in seeking to enjoin the lawful activities of American citizens. The Commission, in its original opinion, conceded that it could have sought injunctive relief in the court of appeals, but the Government attempts, in its petition, to cover up the availability of this remedy by referring to it only in a footnote on the next to last page of its petition. Petitioner, Midwest, ignores the existence of this remedy altogether.

The proper course for the Commission to follow has recently been charted by this Court in *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 16 L. Ed. 2d, 802 (1966). In that case, it was held that the Federal Trade Commission could proceed under the All Writs Act, 28 U.S.C. § 1651(a), and secure an injunction in the court of appeals to maintain the *status quo* pending a final determination on the merits, irrespective of the fact that the FTC, itself, could not issue a stay, nor was specifically authorized by Congress to proceed under the All Writs Act.

The Federal Communications Commission, while conceding that this relief was available to it, sought to justify its decision not to use this remedy by stating that ". . . initial consideration of the matter by the Commission, followed by judicial review . . ." was ". . . preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission." 4 F.C.C.2d 612, 622-623. (See App. C, pp. 53-54). It is submitted that this reason is nothing more than a conclusion unsupported by

fact, and, upon closer analysis, obviously proves nothing. In fact, a contrary principle should apply, namely, that the agency making the decision on the merits should not prejudge the case by determining whether a temporary stay is required in advance of a decision on the merits. Otherwise, the agency ends up as a tribunal committed to a decision already made and the hearing on the merits becomes a useless gesture. However, the real reason that the Commission desires the authority to issue temporary stays is crystal clear—it seeks to avoid the burden of proving, in the first instance, that a temporary stay is in the public interest. The Commission, in all of its appellate oppositions to requests for a stay of its orders, makes contentions similar to those made by Midwest before the court below:

> "A party seeking a stay of an administrative agency's decision pending appeal bears a heavy burden. To obtain such a stay the Courts of Appeals require a showing that: (1) there is a *strong* likelihood of petitioner's success on the merits; (2) petitioners will suffer irreparable injury if a stay is not granted; (3) a stay will not produce substantial harm to others interested in the proceeding; and (4) the public interest favors a stay." (*Opposition to Application for Interlocutory Injunction and To Petition for Stay Pendente Lite*, p. 12, No. 21183, filed August 18, 1966)

Thus, when the Commission issues a temporary stay to maintain the *status quo*, it is the judge of the sufficiency of the showing of what the public interest requires. Moreover, once the temporary stay is issued, the injured party must resort to the court of appeals and assume the burden of showing that *the public interest requires that the administrative stay be lifted.* This is a "heavy burden" and the Commission receives the benefit of this weight.

However, if the Commission were forced to seek its temporary stay in the courts, an entirely different concept would emerge. The Commission then would have the burden of showing that the public interest *requires* the imposition of

a temporary stay in order to maintain the *status quo!* See, *Bankers Life & Casualty Company v. Holland,* 346 U.S. 379, 98 L. Ed. 106 (1953). Thus, the Commission seeks to avoid proceeding under the All Writs Act, not because the Act provides an inadequate remedy or right, but simply because it would require the Commission to assume the burden of showing, to a court's satisfaction, that interlocutory action is, *in fact,* in the public interest.

The Government also attempts to distinguish the *Dean* case by contending that it is based upon the principle that the FTC has no statutory authority to issue injunctions ". . . because of the absence of any provisions in the Federal Trade Commission Act, similar to Sections 4(i) and 303(r) of the Communications Act . . .". (Pet. 20) This may be an argument relative to the merits of the Ninth Circuit decision, (albeit, an invalid one) but it in no way affects the principle, promulgated by *Dean,* that the Commission has the right to obtain a court injunction under the All Writs Act to maintain the *status quo.* The availability of this remedy clearly and effectively points up the error in Petitioners' contentions that the instant decision deprives the Commission of a means to protect the public interest. The fact is that the FTC has a much more vital need for the power to issue temporary stays than does the Federal Communications Commission. Yet, this Court and Congress have been fully content to have the FTC protect the public interest by resort to the courts. There is nothing in this record, or in the petitions, which demonstrate that the Commission cannot do equally well!

The Government and Midwest also contend that the Ninth Circuit decision is in direct conflict with that of the United States Court of Appeals for the District of Columbia Circuit in *Buckeye Cablevision, Inc. v. Federal Communications Commission,* No. 20274, decided June 30, 1967. (App. D, pp. 67-80). This contention is made despite the fact that *Buckeye* was issued over two months after the Ninth Circuit decision and no reference was made to that opinion by the District of Columbia Court.

In *Buckeye*, the court was faced with a Commission decision under the cease and desist procedure specifically provided by Section 312 of the Communications Act of 1934, as amended. The subject of the appeal was a final order of the Commission, issued after proper notice and hearing. The court of appeals noted that Buckeye was challenging the ". . . Commission's distant-signal rules and the cease-and-desist order issued under them." (App. D, p. 69) The court then stated, being fully aware of the Ninth Circuit decision, which had been furnished to it by the General Counsel of the Commission, that "(1) *A threshold question of first impression* is whether the FCC has jurisdiction to regulate CATV systems which employ no microwave transmission." (Emphasis supplied) (*Id.* at 70) The court then concluded that the Commission had such jurisdiction without, it bears repeating, making any reference to the Ninth Circuit decision. The obvious reason the Ninth Circuit decision was not mentioned is that the District of Columbia Circuit Court properly recognized that the question of the extent of the Commission's authority to regulate CATV systems, using proper procedures, was one thing, and the question of its authority to temporarily stay the activities of either licensed or unlicensed entities was quite another.

In *Buckeye*, the court found that the Commission's authority to regulate CATV systems, subject to following required procedural conditions, e.g., Section 312(c) of the Communications Act, flows from Sections 1, 2, 303(f) and (h), and 307(b) in addition to Sections 4(i) and 303(r). Perhaps it will ultimately be determined by this Court that those other sections of the Act alone, or in combination with Sections 4(i) and 303(r), do authorize the Commission to regulate CATV systems. In any event, relying on a theory primarily based on Section 307(b) of the Act, the court in *Buckeye* held that some such statutory complex does provide the needed authority. On the other hand, the court below, since it does not mention these other sections, obviously did not consider the question even indirectly. In fact, the decision below specifically pointed out that ques-

tions, such as those decided by *Buckeye*, were raised by Respondents and just as specifically pointed out that the court was not deciding them. The court below also pointed out that grounds of "constitutional dimension" had been raised by Respondents, but in view of the decisive, although narrow, basis for its decision, declined to consider them. For this reason, there simply is no "conflict of circuits" question presented for this Court's consideration in connection with the instant requests for a writ of certiorari.

The difference in the two decisions is clearly pointed up by the Federal Communications Commission's own determination of the meaning of the Ninth Circuit decision, which incidentally was reached before the Commission had decided to seek relief in this Court. Respondents had filed a petition seeking dismissal or postponement of their pending administrative proceeding on the ground that the Ninth Circuit decision also meant that the Commission had no authority to issue a permanent stay. The Commission rejected that request summarily, stating: (Docket No. 16786, FCC 67-584, dated May 23, 1967)

> ". . . Petitioners have misconstrued the Court's decision. In paragraphs 24-26 of our designation order, FCC 66-683, 4 F.C.C.2d 612, released July 25, 1966, we placed temporary restrictions upon the expansion of the CATV systems pending final disposition of this proceeding.[1] The *Ninth Circuit Court's decision vacated and set aside our order only 'to the extent that it limits the operations of the petitioners [the CATV systems] as set forth in paragraphs 24-26 of this order'* (slip op. p. 10). The request for termination of the proceeding must therefore be denied. The alternative request for a stay of the hearing during the pendency of any action for review of the Court's decision would be inconsistent with the public interest which requires the expeditious resolution of the issues designated for hearing, and that request must also be denied." (Footnote omitted) (Emphasis supplied)

The Government tries to ignore this Commission decision by burying it in a footnote on page 15 of its Petition, while Petitioner, Midwest, completely ignores the Commission's decision as well as its own interpretation of the Ninth Circuit decision filed in opposition to Respondents' petition.[6]

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[6]In its Opposition, filed on May 12, 1967, Midwest stated as follows:

> "The petitions rest on the premise that the decision of the Court of Appeals for the Ninth Circuit in *Southwestern Cable Co. v. United States*, decided April 28, 1967, *means that the Commission lacks power to regulate CATV. This issue was deliberately not decided by the court.* The court held only that the Commission lacked authority to order respondents, without an oral hearing of any sort, to limit the expansion of their operations pending conclusion of the Commission proceeding. Having so held, the court expressly stated:
>
> 'We decline to express any opinion as to the other issues raised in this proceeding.' (Slip op. p. 9.)
>
> "Respondents can find no comfort in the court's reliance on their arguments in support of their contention that the Commission lacks any power to regulate CATV. (See brief of Mission Cable TV, Inc., et al., to the Ninth Circuit Court of Appeals, pp. 18-20.) The court relied on these arguments only to support its holding that the Commission lacked the power to issue temporary relief. Whether or not the court would accept respondents' arguments and decide that the Commission entirely lacks the power to regulate CATV is not known, for the court expressly declined to decide that question.
>
> "The question of the power to regulate CATV is presented in two cases in the Court of Appeals for the District of Columbia Circuit, one of which has been fully briefed and argued and awaits decision. *Buckeye Cablevision, Inc. v. FCC*, No. 20,274; *TeleSystems Corp. v. FCC*, No. 20,387. The question is also presented in several appeals from the Commission's *Second Report and Order* which are now pending in the Eighth Circuit Court of Appeals. *Black Hills Video Corp., et al. v. United States*, Nos. 18052, 18348, 18481, 18482, 18793, 18813, 18839.
>
> "In light of the pendency of these cases, in which the power to regulate is squarely presented, it would be wholly improper for the Commission to dismiss this proceeding on

The Government, in its footnote, cannot bring itself to repudiate expressly the Commission's first evaluation of the lower court's action but attempts to straddle the fence by stating that the Commission's decision does not commit it to a "narrow view of that decision" or impair its ability to seek review "of the broad rationale" on which the decision was based. (Pet. 16)

It is submitted that such an ambivalent position is particularly unfortunate when adopted by two agencies of the Federal Government in their relations with American citizens. They, as well as the courts, are charged with the responsibility of dealing fairly and honestly with the public and protecting the rights of citizens. Yet, this Court now is presented with the picture of an administrative agency interpreting an appellate court decision in two diametrically different ways, and, in each instance, the interpretation is in the self-serving interest of the agency and to the detriment of the citizens against whom the agency is proceeding. In addition, it is clear that the public interest would not have been harmed if the Commission had, at least, postponed the administrative hearing pending a decision on the petition for certiorari, since the Ninth Circuit stay on CATV construction remained in effect. It is submitted, therefore, that Petitioners' prior actions must be considered by this Court in passing upon the validity of their present contentions of the need for review of this decision.

It appears that the Commission's action in continuing the adminsitrative proceeding is motivated by a preconceived intention to limit CATV operations in San Diego, irrespective of judicial decisions.[7] The effect on Respondents of the

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the ground that the Ninth Circuit has decided the power question against the Commission, especially when the court expressly said that it was not deciding the question." (Emphasis supplied)

[7]It is significant to note that the Commission's press section made no mention of the Ninth Circuit decision. Yet, when the United States Court of Appeals for the District of Columbia Circuit decision was issued, the Commission issued a long press release indicating its jurisdiction over CATV had been confirmed.

grant of the petition for certiorari, followed by an early administrative decision and the issuance of a permanent stay, is obvious.[8] A decision on the merits by this Court, affirming the court below, will be meaningless so far as Respondents are concerned, since the temporary stay will have been superseded by the permanent stay. Under these circumstances, the Respondents will have to institute new appellate proceedings and start up the long road to this Court, once again, if they are to obtain any relief. It is clear, therefore, that, in light of the Commission's refusal to stay the administrative proceeding, the granting of certiorari in this case, will be the same as a reversal on the merits, so far as Respondents are concerned.

In addition, Petitioners allege that the Ninth Circuit decision is in conflict with two other circuit court decisions, but this contention also is completely without merit. Petitioner, Midwest, refers to the Tenth Circuit decision in *Amerada Petroleum Corp. v. Federal Power Commission,* 293 F.2d 572 (C.C.A. 10th, 1961), *cert. denied,* 368 U.S. 976 (1962), which deals with a specific Congressional delegation of power to the FPC. Section 4(d) of the Natural Gas Act of 1938, as amended, 52 Stat. 822, 15 U.S.C.A. § 717c (1963), provides that unless the FPC orders otherwise, no change can be made in any rate except upon thirty days notice, but the FPC, "for good reason shown" may allow the change to take effect without requiring the thirty-day notice. Section 4(e), gives the FPC *the specific power to suspend the operation* of the new tariffs pending hearing upon the lawfulness of such new charges. In proceedings under these two sections, the FPC had established a policy that, during the suspension of a new rate, the prior existing rate schedule continued in effect and could not be changed. Thus, the FPC's order

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[8]The Broadcast Bureau, in its proposed findings, has recommended that CATV in San Diego be prohibited from carrying all independent Los Angeles stations as well as originating programs. This Bureau pleading also was the subject of a Commission press release, while Respondents' Proposed Findings were never recognized.

was the logical application of power *specifically* given by Congress.[9] Section 16 of the Natural Gas Act, the general powers section, was cited incidently in support of this application of the specific authorization. In contrast, the Federal Communications Commission has no specific grant of power to issue a temporary stay except for the limited purpose expressly provided for in Section 204. Thus, the Commission's entire reliance on the general powers given by Sections 4(i) and 303(r) cannot be equated to or justified by the court's approval of the action of the FPC.

Both Petitioners rely on the decision of the United States Court of Appeals for the District of Columbia Circuit in *R. A. Holman Co., Inc. v. Securities and Exchange Commission*, 112 U.S. App. D.C. 43, 299 F.2d 127 (1962), *cert. denied*, 370 U.S. 911 (1962), which upheld the power of the SEC to suspend, without hearing, a broker's right to deal in exempt securities under the agency's general regulatory power. Petitioners ignore the controlling fact which is that the court in *Holman* did not have before it the issue of whether Congress had given the SEC the power to order such a suspension. Both the appellant and the Government in that case assumed that Congress had given the SEC the required power, and the sole issue was whether the grant of such a power was valid. The issue before the Ninth Circuit was entirely different. It was simply whether or not Congress had *given the Commission the power to grant a temporary stay*, not, as in *Holman*, whether the grant of such power was valid. Thus, there is clearly no conflict between the instant decision and the District of Columbia Circuit Court's opinion in *Holman*.

Respondents concede that the Commission's assertion of jurisdiction over CATV systems present problems of far-reaching importance involving not only basic questions of statutory authority but also questions of significant "con-

[9] This is precisely what the Federal Communications Commission is authorized to do under the provisions of Section 204 of the Communications Act.

stitutional dimension", the latter having to do with the First and Fifth Amendments to the Constitution of the United States. The decision of the Ninth Circuit, however, is not the proper vehicle for presenting those questions to this Court because the decision of the court below is much too narrow.

However, there are five cases now pending in the United States Court of Appeals for the Eighth Circuit which will provide a proper vehicle for presenting these very important questions to this Court. The Eighth Circuit petitioners include Respondents here (Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp.), Buckeye Cablevision, Inc., Black Hills Video Corporation, Midwest Video Corporation and Alice Cable Television Corporation.[10] In addition, the intervenors in the Eighth Circuit consolidated proceeding include the National Association of Broadcasters and the National Community Television Antenna Association. The questions posed *directly* before the Eighth Circuit include the same jurisdictional question on which Petitioners want a ruling by this Court. In addition, the constitutional question, also raised but not considered or ruled on by the court below, is fully briefed before the Eighth Circuit. Briefs for the petitioners have been filed and the cases are scheduled for argument in October, 1967.

In reaching a decision, the Eighth Circuit must pass on whether the Federal Communications Commission lacks statutory authority to regulate CATV systems (but not on whether it lacks statutory authority to issue temporary stays either against licensees or non-licensees). If it decides this issue affirmatively, the court must then determine whether the regulation of CATV systems, in the manner contemplated by the Commission's rules, violates the First and Fifth Amendments to the Constitution of the United States. If either issue is decided adversely to the Commission, the Government will have a bona-fide conflict. On the other

[10]The case numbers are as follows: 18839, 18813, 18052, 18348 and 18793.

hand, if the Eighth Circuit should decide in favor of the Government, it is a foregone conclusion that one or all of the Eighth Circuit petitioners will request this Court to review the decision. Under these circumstances, Respondents submit that Petitioners, by filing for review of the narrow holding of the Ninth Circuit, are not only requesting this Court to prematurely judge an extremely complex legal question, not properly before it, but also are seeking to subject this Court to a multiplicity of litigation.

In this connection, it is the stated position of Petitioners that the question they want this Court to decide is ". . . whether the Federal Communications Commission has jurisdiction to regulate non-microwave community antenna (CATV) systems." (Pet. 2) Their concern about the Commission's authority to issue temporary stay orders is obviously secondary and is advanced only to give this Court a "handle" with which to get at the question of primary interest to them.

Moreover, in Respondents' opinion, it is extremely doubtful, in view of Rule 23(c), whether this Court can properly reach all of the fundamental questions that must be considered before the Commission's authority with respect to CATV systems can be determined. Among others, the very important constitutional issues cannot be said to be "fairly comprised" within the questions presented by Petitioners, since they are not even alluded to in Petitioners' arguments in support of the Commission authority.

On the other hand, all questions of importance, including those considered by the United States Court of Appeals for the District of Columbia Circuit in *Buckeye*, are squarely presented in the Eighth Circuit cases and will unquestionably be just as squarely presented to this Court for review following a decision in that circuit.

CONCLUSION

It is well recognized, and Respondents agree, that the question of federal regulation of CATV in particular, and transmission by wire of program material and information in general, and the nature and scope of such regulation, will not be finally determined short of a decision by this Court. To be meaningful, however, the decision must encompass all of the many subsidiary questions involved and should be arrived at only after all of the many interested parties have had an opportunity to express their views in the forums in which they are entitled to appear. Such a decision, it is respectfully submitted, will not be forthcoming if based on the limited review improperly requested, but obviously desired, by Petitioners. The decision below, which Respondents believe to be correct, is not of general significance to administrative law and involves no conflict of circuits. Moreover, it does not deprive the Commission of any needed remedy to protect the public interest. It is respectfully submitted, therefore, that the petitions for writ of certiorari should be denied.

Respectfully submitted,

FRANK U. FLETCHER
ROBERT L. HEALD
EDWARD F. KENEHAN

FLETCHER, HEALD, ROWELL,
KENEHAN & HILDRETH
1023 Munsey Building
Washington, D. C. 20004

Counsel for Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp.

August 26, 1967

APPENDIX A

Communications Act of 1934, 48 Stat. 10674, as amended, 47 U.S.C. § 151 *et seq.* (1964):

SEC. 204. Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 312

* * *

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated

in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

SUPREME COURT, U. S.

AUG 26 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 363

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.,
Respondents

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELE-
CASTERS, INC., AND JACK O. GROSS,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.,
Respondents

---

*ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR SOUTHWESTERN CABLE CO. IN OPPOSITION

MORTON H. WILNER
ARTHUR SCHEINER
HAROLD F. REIS
Landmark Building
1343 H Street, N.W.
Washington, D.C. 20005
*Attorneys for Respondent
Southwestern Cable Co.*

Of Counsel:

WILNER, SCHEINER & GREELEY
Landmark Building
1343 H Street, N. W.
Washington, D. C. 10005

Washington, D. C. THIEL PRESS 202 393-0625

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IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.A,[1] pp. 21-30) is reported at 378 F.2d 118. The Federal Communica-

[1] The petition for a writ of certiorari filed by the United States in No. 363 incorporates six appendices, designated A through F, inclusive.

tions Commission's (hereinafter referred to as "the Commission") memorandum opinion and order (Pet.App.C, pp. 33-65) is reported at 4 F.C.C.2d 612.

JURISDICTION

The judgment of the court of appeals (Pet.App.B, pp. 31-32) was entered on April 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350.

QUESTION PRESENTED

Whether the Commission has authority without a hearing to restrain for an extended period of time the operation of particular CATV systems which are conceded to comply with the governing statute and the Commission's rules relating to the operation of CATV systems pending a protracted evidentiary hearing to determine if their operations should be made subject to permanent *ad hoc* "additional or different requirements" than those imposed upon CATV systems generally by the Commission's rules.

STATUTES INVOLVED

Sections 4(i), 303(f), 303(r), 312(b), 312(c), 312(d), 312(e) and 316 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 154(i), 303(f), 303(r), 312(b), 312(c), 312(d), 312(e) and 316, are set forth in Appendix A, hereof, *infra,* pp. 25 to 27.

That petition is referred to herein as "Pet." and its various appendices as "Pet.App.A", etc. The petition for a writ of certiorari filed by Midwest Television Inc., San Diego Telecasters, Inc., and Jack R. Gross in No. 428 is referred to as "TV Pet." In addition, "R." is used to refer to respondents' appendix in the court of appeals, ten copies of which have been lodged with the Clerk of this Court.

STATEMENT

The proceeding here involved was initiated by a petition filed with the Commission on March 17, 1966, by Midwest Television, Inc. (hereinafter referred to as "Midwest"), licensee of Station KFMB-TV, San Diego.[2] In summary, Midwest's petition was directed to obtaining a final order from the Commission "appropriately confining carriage of Los Angeles television signals" (Pet.App.C, pp. 33-35, 39) by respondents. All of the respondents are CATV systems, and all had obtained CATV franchises from communities in the San Diego area and had commenced operations prior to February 15, 1966.[3] Therefore, all were actually in operation before the Commission had undertaken to regulate non-microwave CATV systems pursuant to its *Second Report and Order* of March 4, 1966 (2 F.C.C.2d 725; R.49, *et seq.*), and before the effective date for the recognition of grandfather rights relating to the carriage of distant signals under the Commission's regulations (Pet. 3-8; Pet.App.A, pp. 22-23).

However, the rules adopted by the Commission in conjunction with the *Second Report and Order* contain an open-ended reservation of authority to impose upon a particular CATV system "additional or different requirements" than those contained in the rules relating to the operations of CATV systems generally upon receipt of a petition filed by an interested person, including the licensee of a television station. When such a petition is filed, an evidentiary hearing may be held in the discretion of the Commission. If it determines that one is required it will also determine "whether temporary relief should be accorded to any party pending the hearing and the nature

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[2] Thereafter the licensee of another San Diego television station and the holder of a television construction permit became parties in the proceeding before the Commission, supporting Midwest.

[3] Respondent, Southwestern Cable Co. (hereinafter referred to as "Southwestern"), began service to subscribers on December 22, 1965, pursuant to a franchise issued to it effective October 30, 1964, by the City of San Diego in an area lying north of the San Diego River channel.

of any such temporary relief" (47 C.F.R. 74.1109(a), (f); Pet. App.F, pp. 89, 91).[4] As the Commission later conceded in connection with the issuance of an interlocutory injunction by the Ninth Circuit on August 23, 1966, none of the respondents "is presently in violation of the governing statutes and Commission rules" relating to the operation of CATV (App. B, *infra*, p. 28). Nor does either of the petitions for certiorari contend that any such violation is here in issue. Midwest's petition was therefore directed at the imposition of such "additional or different requirements" upon respondent CATV systems.

All of Midwest's contentions were denied or opposed by the respondents in various pleadings and supporting documents filed with the Commission (Pet.App.C, p. 34); and the Commission by memorandum opinion and order, released July 25, 1966[5] designated the matter for hearing "pursuant to Sections 74.1109 and 74.1107(a) and (d) of the Commission's Rules." The order enumerated and set out specific issues to be covered in the hearing relating to the present and potential penetration of CATV service in the San Diego market, its affect or potential affect on local television stations, whether or not expansion of the respondent CATV systems should be limited and what, if any, action should be taken by the Commission. (*ibid.*, pp. 58-60)

Pursuant to the Commission's order, hearings commenced on December 12, 1966. Pre-hearing conferences were held

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[4]Similarly, Section 74.1107(d) of the Commission's rules (47 C.F.R. 74.1107(d)) provides with respect to the extension of services by CATV systems in operation before the adoption of the rules:

> "... The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief."

[5]An errätum to the memorandum opinion and order was released on July 25, 1966 (*ibid.* pp. 62-65).

on September 9 and 30 and December 2, 1966. Hearings were held on the following days: December 12 through 16, 1966; December 19 through 21, 1966; February 6 through 10, 1967; February 13 through 16, 1967; March 20 through 24, 1967; March 26 and 27, 1967; and April 7, 1967. The record was closed on April 7, 1967, and was subsequently reopened for further hearings which were held on July 10 through 12, 1967. The record was finally closed on the latter date. Proposed Findings of Fact and Conclusions of Law were filed on August 11, 1967.[6] Following the release of the Hearing Examiner's Initial Decision, that decision will be reviewed by the Commission pursuant to Section 1.276 of its Rules (74 C.F.R. 1.276), and presumably a final order will then be issued.

In its petition Midwest also requested that if a hearing should be ordered the Commission should issue, pending final disposition, a "cease and desist" order or an order for "temporary relief" which would "confine delivery of the Los Angeles signals to subscribers located within the specific geographic boundaries inside of the general geographical areas where the [CATV] systems were operating on February 15, 1966" (Pet.App.C, pp. 33-35, 39). The CATV systems objected strenuously to the equities of a grant of Midwest's request for the issuance of such a "cease and desist" order or order for "temporary relief" (*ibid.* pp. 41, 43-44). Respondent Southwestern alleged that Midwest had failed to show it would be irreparably injured without such interim relief, but that the grant of interim relief would dry up Southwestern's financing.[7] And, indeed, the court below

[6]Federal Communications Commission, Docket No. 16786.

[7]Installation of Southwestern's system required a considerable expenditure of time, effort and money. Among other things, these include obtaining pole attachment agreements with the local telephone and gas companies, the location, acquisition and construction of an antenna and head-end site, the acquisition and installation of equipment and obtaining necessary financing through bank loans related to the expansion of operations in accordance with the projected development of demand for its service within the franchise area.

later issued its interlocutory injunction in part because of Southwestern's "present financial difficulties" and because it would "lose substantial and irretrievable gross income" and might "be forced to suspend all operations" (App. B, *infra*, p. 28)

Nevertheless, the Commission did provide in its order for "temporary relief pending final disposition of this proceeding" substantially as requested by the television stations. The order requires that "pending the outcome of this proceeding" the CATV systems must confine delivery of Los Angeles signals within the franchise areas in which they were operating on February 15, 1966. Outside those areas Los Angeles signals may only be delivered to subscribers who either had begun receiving service or who had contracted for such service between February 15, 1966, and the date of the order. (Pet.App.C, pp. 56-58, 60) This action was taken on the basis of the pleadings and supporting documents without a hearing and after denial of respondents' request for oral argument (*ibid.*, p. 61). In its interlocutory injunction of August 23, 1966, the Ninth Circuit limited the Commission's order as it affected the addition of new subscribers to CATV trunk and feeder lines actually in existence as of August 23, 1966. (App.B, *infra*, p. 28) Therefore, subject to that modification, the respondents have been operating for over a year pursuant to restrictions imposed upon them by the Commission without either a hearing or an oral argument.

In connection with this order for "temporary relief" the Commission expressly rejected the respondents' contention that Section 312 of the Communications Act constitutes the only basis for a stay pending a hearing, and, since the procedures required by that section had not been followed, the Commission lacked the authority to take such interim action. The Commission concluded, instead, that the imposition of a stay pursuant to the temporary relief provisions of Sections 74.1107 and 74.1109 of its rules constitutes a valid exercise of the authority conferred upon it by Section 4(i) of

the Act to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act as may be necessary to the execution of its functions." It also referred to similar general regulatory provisions of the Act, Sections 303(f) and (r), as support for this general authority. (Pet. App. C, pp. 62-63)

Moreover, the Commission expressly considered, as a possible alternative procedure, seeking an injunction "in order to preserve our jurisdiction to enter an effective order after a hearing" under the authority of *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597 (1966). However it rejected this course on the asserted ground that it "would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission." (Pet.App.C, p. 63)

Southwestern, as did the other CATV systems involved in a separate petition, sought review of the order in the Court of Appeals for the Ninth Circuit. That Court consolidated the actions and permitted Midwest and the other television broadcasting interests to intervene. Preliminarily, on August 23, 1966, the Court issued the interlocutory injunction referred to above. It took this action in part because of the order's grave financial impact on Southwestern and in part because of the Commission's concession "that none of the petitioners [respondents here] is presently in violation of the governing statutes and Commission rules with respect to any of the matters dealt with in the described Commission order,..." (App.B, *infra*, p.28). Thereafter on April 28, 1967, that court issued its opinion here sought to be reviewed. It concluded that the Commission lacked the power to issue its order for temporary relief pending a hearing and, to that extent, set the order aside (Pet.App.A, pp. 21-30). The court did not, however, reverse that portion of the Commission's order designating the controverted issues for hearing. That hearing has been in process for over a year.

Since the Commission had not invoked the procedures required by Section 312[8] in connection with the issuance of its order for temporary relief, it relied in court solely upon Sections 4(i) and 303(r) of the Act. However, while the court recognized that the latter provisions are intended "to provide the Commission with a degree of flexibility in performing its important tasks", it concluded that they "are to be measured by the Act and its structure and purpose" (*ibid.*, p. 25). Viewing licensing to be central to the regulatory scheme established by the Act, it concluded "that Sections (4(i) and 303(r) are limited to the scope of the Commission's licensing authority" (*ibid*, p. 29). In support of its conclusion the court stated:

> "The logic of our conclusion seems to us inescapable. If the authority of sections 4(i) and 303(r) were as broad and extensive as the Commission urges, the authority of section 312 to issue cease and desist orders would be meaningless or repetitive. There is nothing to indicate that if the Commission is empowered to issue an order like that under review it cannot similarly issue a cease and desist order without the safeguards of section 312. Cf. *United States v. National Plastikwear Fashions, Inc.*, 123 F. Supp. 791 (S.D.N.Y., 1954). We must assume that when Congress in 1952 gave the Commission the power to issue cease and desist orders it was not duplicating an already existing power." *(id.)*

Both in the proceedings before the Commission and those before the court the CATV systems "specified many grounds

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[8]Section 312(b) of the Act authorizes the Commission to issue cease and desist orders against persons who have failed to operate as licensed or have violated or failed to observe the provisions of the Act or designated provisions of the Criminal Code or validly issued rules and regulations of the Commission. Section 312(c) requires that the issuance of such an order must be preceded by service of an order to show cause and, unless waived, by a hearing. Section 312(d) provides that "where a hearing is conducted both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

for setting aside the Commission's order, some of constitutional dimension" (Pet.App.A, p. 24). As to these contentions, however, the court expressly stated: "In light of our disposition of the case, we decline to express any opinion as to the other issues raised in this proceeding" (*ibid.*, p. 29).

SUMMARY OF ARGUMENT

The petitions for certiorari should be denied because:

(1) The instant case does not involve any question of substantial significance concerning the basic power of the Commission to regulate CATV systems. The holding below is in fact narrow in scope and limited in application, for the court left intact that portion of the Commission's order which directed an evidentiary hearing aimed at determining whether the respondent CATV systems should be made subject to *ad hoc* "additional or different requirements" than those imposed upon CATV systems generally, and that hearing has proceeded. Accordingly, the Court left it open to the Commission after the conclusion of the hearing to impose upon the respondents permanent restraints of the type now only "temporarily" imposed. The opinion below is directed only to the question whether the Commission may —without hearing or oral argument—issue an order designated as one for "temporary relief" but in fact restraining the concededly legal operations of the respondent CATV systems for an extended period of time, pending a protracted evidentiary hearing as to whether their operations should be made subject to permanent *ad hoc* "additional or different" requirements. The instant case is the only one now before the courts relating to the regulation of CATV which involves so narrow a procedural question rather than the ultimate issues relating to the Commission's authority to regulate CATV.

(2) Any decision this Court may reach will be moot if, after the termination of the hearing and before this Court reaches its decision, the Commission either vacates the order for "temporary relief" or supersedes it with a permanent

order. Even if such Commission action follows rather than precedes this Court's decision, the decision will, at most, be in effect for a very brief period.

(3) The decision below is clearly supported by the language and structure of the Communications Act, by its interpretation and application by the Commission itself and by other relevant authority concerning the power of regulatory agencies to issue interim stay orders designed to protect the ultimate exercise of their powers. The Commission may not issue a cease and desist order against a licensee accused of violating the terms of his license or the Act or the Commission's rules. It may not therefore take such action against a non-licensee not accused of violation of the Act or the Commission's rules. Moreover, in order to reverse the decision below—if the petitions for a writ of certiorari should be granted—this court would have to hold that the Commission has the authority to restrain, without a hearing or even oral argument, concededly lawful activity pending a Commission decision as to whether it should permanently impose limitations on that activity not otherwise imposed by law or its rules.

(4) The decision below is not in conflict with a decision of any other circuit. *Buckeye Cablevision Inc. v. Federal Communications Commission,* No. 20,274, C.A.D.C., June 30, 1967 (Pet.App.D, pp. 67-80), deals with a permanent cease and desist order issued by the Commission after a hearing pursuant to Section 312(b) of the Communications Act. The instant case involves only the validity of an order for "temporary relief" issued by the Commission prior to holding a hearing. If the Commission, after the completion of the hearing and related proceedings involved in this case, issues a permanent cease and desist order against the respondents and the Ninth Circuit vacates such a permanent order, issues involving the basic authority of the Commission to regulate CATV may be presented and a conflict may exist with *Buckeye.* Neither are presented by the interlocutory order here in issue.

ARGUMENT

I

The court below defined the threshold question in this case to be whether the Commission had the power to issue its order for "temporary relief", and, having found an absence of such power, declined "to express any opinion as to the other issues raised in this proceeding." (Pet.App.A, p. 29) And, suiting its action to its definition of the issue it was deciding, the court vacated only that portion of the Commission's order of July 25, 1966, providing for temporary relief. It did not vacate that portion of the Commission's order directing that a hearing be held. That hearing has continued. Nothing in the court's order prevents the Commission, if it deems it appropriate after the hearing is concluded, from then imposing "additional or different requirements" upon the respondent CATV systems. If it should do so, the broad question of the Commission's "jurisdiction to regulate non-microwave community antenna television (CATV) systems" (Pet., p. 2; see also TV Pet., p. 2) may be ripe for judicial review. That question was not decided below and is not presented here.[9]

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[9] In *Valley Vision, Inc. v. United States* (Nos. 61869, 21870, C.A. 9, Order of June 29, 1967), the Ninth Circuit stayed, pending review by it, a cease and desist order issued by the Commission against a CATV system allegedly operating in violation of the distant-signal rules. Because the Ninth Circuit cited its opinion in this matter in the stay order, it is suggested that that court has accorded a broad reading or construction to the opinion. We do not question the view that difficult and important problems of law are involved in the Commission's regulation of CATV systems or that some of these problems were reflected—but not decided—below. Nevertheless the issuance by a court of a temporary stay pending decision involves a complex of legal and equitable considerations. The mere reference in the three-sentence stay order to the court's opinion in this case does not, therefore, justify the inference that it reads the opinion as deciding ultimate issues as to the Commission's jurisdiction over CATV. Moreover, the cease and desist order stayed in *Valley Vision* was a final order not an interlocutory one, and was issued pursuant to Section 312(b), after a hearing and upon a determination

Indeed, until the Government's petition was filed, even the Commission construed the opinion below as relating only to its order for "temporary relief." After the opinion below was issued the respondent CATV systems petitioned the Commission to terminate the hearing. In the alternative they requested a stay of the hearing pending a determination whether further review of the decision would be sought and, if so, pending the disposition of such further review. The Commission denied both requests. In its order of denial it stated:

> "Petitioners have misconstrued the Court's decision. In paragraphs 24-26 of our designation order, FCC 66-683, 4 F.C.C.2d 612 [8 R.R.2d 278], released July 25, 1966, we placed temporary restrictions upon the expansion of the CATV systems pending final disposition of this proceeding. The Ninth Circuit Court's decision vacated and set aside our order only 'to the extent that it limits the operations of the petitioners [the CATV systems] as set forth in paragraphs 24-26 of that order' (slip opinion, p. 10). The request for termination of the proceeding must therefore be denied. The alternative request for a stay of the hearing during the pendency of any action for review of the Court's decision would be inconsistent with the public interest which requires the expeditious resolution of the issue designated for hearing, and that request must also be denied."[10]

It is, of course, true that the comparatively recent development of CATV has raised significant and difficult problems concerning its impact upon and relationship with other

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that the Commission's rules relating to the operation of CATV systems were being violated. *Valley Vision, Inc.*, 10 Pike & Fischer R.R. 2d 83 (1967). Conceivably, that case may provide a vehicle for judicial review of the Commission's ultimate authority over CATV systems. In its present posture the instant case does not.

[10] Order of May 17, released May 23, 1967. Docket Nos. 16786, 17008; *Midwest Television, Inc.*, 10 Pike & Fischer R.R. 22, 23 (Footnote omitted).

media—primarily television broadcasting. In view of the far-reaching significance of many of the problems involved, they have been the subject of consideration in a variety of forums, including the state[11] and federal[12] legislatures, the Commission and the federal courts. Those problems include—with respect to private relationships—the liability of CATV systems for engaging in performances purportedly in violation of Section 1 of the Copyright Act (17 U.S.C. 1). *United Artists Television Inc. v. Fortnightly Corp.*, __ F.2d __, 153 USPQ 696, 9 Pike & Fischer R.R.2d 2083 (C.A. 2, May 22, 1967.

Of course the Commission and therefore the federal courts are presented with a series of related and important questions concerning the existence of the former's regulatory authority and the statutory and constitutional validity of particular aspects of its regulatory efforts. Some indication of the extent of the problems is provided by the list, contained in the Government petition (Pet.App.G, pp. 93-95), of CATV cases now pending in the courts of appeals. The issues involved in completed and pending cases include Commission jurisdiction with respect to both microwave carriage for CATV[13] and the Commission's jurisdiction over CATV generally. Thus the Government's petition notes no less than 11 cases now pending in the courts of appeals (Pet., p. 16, Pet.App.G, pp. 93-95) involving the latter question. Such cases ordinarily arise in the context of Commission ac-

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[11] See, e.g., Conn. Pub. Act 425, 1963, requiring the receipt of a certificate of public necessity and convenience from the State Public Utilities Commission prior to the construction or operation of a CATV system.

[12] See, e.g., in the 90th Cong., 2d Sess., H.R. 2512 (as introduced), § 111; H. Rept. No. 83, pp. 6-7, 48-59; and Cong. Rec. pp. H3642-H3643 (Daily Ed., April 6, 1967); all concerning copyright protection and CATV carriage of local and distant signals.

[13] *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F.2d (C.A.D.C. 1963), certiorari denied 375 U.S. 951 (1963).

tion directed at a CATV system allegedly operating in violation of its rules, e.g., *Buckeye Cablevision Inc. v. Federal Communications Commission,* No. 20,274, C.A.D.C., June 30, 1967; Pet.App.D, pp. 67-80. However, some request direct review of the rules adopted in conjunction with the issuance of the *Second Report and Order.* See, e.g., *Black Hills Video Corp. and Midwest Video Corp. v. United States of American and Federal Communications Commission,* Nos. 18052, 18348, C.A. 8. Nor are the issues limited simply to the jurisdiction of the Commission. The cases also deal with the validity of particular methods of its exercise. Both *Buckeye* and *Black Hills* involve questions as to the validity of the non-duplication and distant-signal rules under the First Amendment, even assuming Commission jurisdiction.

None of these basic questions involving the Commission's jurisdiction and authority, or the constitutional validity of its rules, is presented in this case. On the contrary, the decision below is directed solely to one narrow question—the power of the Commission to issue an order without hearing or oral argument restraining the concededly legal activities of parties before it for an indefinite period of time pending the conclusion of a hearing and the issuance of a final order. The question is obviously not one involving basic issues concerning the regulation of CATV systems or their private liability now being considered in other courts and other forums.[14] In fact, the instant case is the only one now pending in the courts involving the authority of the Commission to issue an order for "temporary relief".

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[14]Had the substantive question been reached below it would have involved a situation in which the Grade B contours of television stations in one major market overlap another major market. This is a situation which the Commission described in the *Second Report and Order* as "the rarest exception." It stated that such "instances rarely arise." (R. 110; 2 F.C.C.2d at 786) Accordingly, even the substantive question here involved is hardly of the same order of significance as other questions relating to the Commission's regulation of CATV.

II

In the present posture of this case it is likely that a decision by this Court upon review will either be moot or will be operative for only a limited period of time. As set forth above, the evidentiary portion of the hearing directed by the Commission has finally been concluded; and following the Hearing Examiner's initial decision, the matter will be ready for review and final decision by the Commission. Such final action will either (1) supersede the order for "temporary relief" with an order requiring the respondent CATV systems *permanently* to operate subject to *ad hoc* restrictions "additional or different" to those now required by the rules; or (2) will result in a determination not to impose such restrictions upon them. Accordingly, whatever its nature, if the final action of the Commission is taken before this Court reaches its decision, such decision will have been rendered moot by the Commission action. And even if final action is not taken by the Commission until after the decision of this Court, the decision will be operative only for the limited interval between this Court's decision and the Commission's final action. Of course, if this Court should review this case and decide it in favor of the respondents, they will no doubt have the satisfaction of having established a legal principle. They are not, however, likely to reap any other benefit from the vindication of their rights by the highest court of the land—some year and a half after the Commission conceded that they are not "in violation of the governing statutes and Commission rules. . .".

Moreover, if the Commission's final order does impose restrictions on respondents' operations, there will be presented for judicial review an order of permanent rather than transitory impact and one based upon a full hearing. At that point the case will be ripe for judicial review of the Commission's authority to regulate CATV systems in whatever manner may be provided for in the final order.

III

The evidentiary hearing which the Commission ordered and which is still in process is designed to determine whether "additional or different requirements" should be imposed on an *ad hoc* basis upon respondent CATV systems, which are not licensees of the Commission, even though it is conceded that those systems are operating in accordance with the Communications Act and the Commission's rules. Even if the respondents were licensees of the Commission accused of violating the terms of their licenses or the Communications Act or the Commission's rules, the Commission would lack the power to restrain their operations except after a full evidentiary hearing and a determination that such violations have in fact occurred. This is made clear by the governing general legal principle; by the judicial authority concerning similar attempts of other regulatory agencies temporarily to restrain activities pending a hearing to determine the existence of violations of law or regulation; by the Communications Act itself; by the publicly expressed views of the Commission; and by its actual practice. It follows that the Commission has no greater authority with respect to respondents who are not licensees of the Commission and who are not accused of any violation of its rules or of the statute.

The general rule respecting the power of a regulatory agency to issue interim restraining orders pending a hearing on the actual existence of a violation is that:

> "Congress has granted to some agencies the power to issue orders effectively preserving the status quo, at least for a certain length of time, pending their own decisions. Absent such statutory grant, however, it does not appear that a Federal administrative agency can issue such orders, regardless of the harm which may occur pending its decision or the possible inefficacy of orders it may enter after decision." Jaffe, *Judicial Control of Administrative Action*, 662 (1965) (Footnote omitted).

Trans-Pacific Frght. Conf. of Japan v. Federal Maritime Bd., 302 F.2d 875 (C.A.D.C., 1962), is a representative illus-

tration of this rule. In that case the Federal Maritime Board had set for a hearing an alleged violation of Section 22 of the Shipping Act (46 U.S.C. 821) and had ordered the allegedly violating shipping conference and its agent to cease and desist from taking the actions complained of "until the Board issues a final order in this proceeding." 302 F.2d at 877. The court reversed, pointing out that the interim order which the Board issued was "akin to judicial injunctive power . . . But the Board is not a court and cannot rely for its action on the powers of a court of equity."[15] 302 F.2d at 880. The court failed to find any express power in the general provisions of the Shipping Act to issue such an interim order and emphasized that:

> "Congress has repeatedly demonstrated that it knows how to make an express delegation of authority to issue interim cease and desist orders when it so desires. See, e.g., 15 U.S.C.A. § 45(b) (Federal Trade Commission); 16 U.S.C.A. § 820 (Federal Power Commission); 29 U.S.C.A. § 160(c) (National Labor Relations Board); see also Shipping Act § 17, 46 U.S. C.A. § 816. Frequently, Congress has expressly provided that an agency can obtain this form of relief by applying to an appropriate District Court. See, e.g., 15 U.S.C.A. §§ 53(a), 68e(b), 69g(b), 70f (Fed-

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[15] In the instant case the Commission deliberately decided not to seek "an immediate injunction" under the All Writs Act (28 U.S.C. 1651(a)) and the doctrine of *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597 (1966), because it regarded "interim action" by the Commission itself to be "preferable." (Pet.App.C, p. 63). There does not exist with respect to the Federal Communications Commission the special statutory scheme of the Clayton Act and history of legislative treatment which led the dissent in *Dean Foods* to conclude that in the circumstances there involved injunctive relief was available only in the district courts in an action instituted by the Attorney General; and the Commission's language indicated no doubts as to the availability to it of injunctive relief under the All Writs Act. In effect, therefore, the Commission decided it was "preferable" that it rather than the courts exercise "the powers of a court of equity."

eral Trade Commission); 49 U.S.C.A. §§ 5(8), 43 (Interstate Commerce Commission)." *id.*

See also *Standard Airlines, Inc. v. Civil Aeronautics Board*, 177 F.2d 18 (C.A.D.C., 1949) holding that in the absence of express statutory authority, the CAB could not suspend a letter of registration granted an irregular air carrier pending a hearing.

The Communications Act itself is an example of Congress knowing "how to make an express delegation of authority to issue interim cease and desist orders : . ." Thus, with respect to the Commission's rate making authority over common carriers Section 204 of the Act (47 U.S.C. 204) expressly authorizes it to suspend the operation of charges and similar tariff provisions filed with it pending a hearing ". . . but not for a longer period than three months . . ." In contrast, under Section 303(m) of the Act, radio operators' licenses may be suspended in specified circumstances upon fifteen days' notice, but the suspension must be "held in abeyance" if an application for a hearing is made within the fifteen day period. In similar contrast is Section 312(b), the only provision of the Act which confers general power to issue cease and desist orders for the failure to operate as licensed or to observe the terms of the Act or of "any rule or regulation of the Commission authorized by this Act . . ." However, issuance of the order must be preceded by an evidentiary hearing, unless waived (§ 312(c)), at which "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission . . ." (§ 312(d)).

Moreover, the Commission itself has made it clear that the procedures established by Sections 312(b) and (c) are to be followed with respect to alleged violations of its rules governing the operation of non-microwave CATV systems. The Commission included in the *Second Report and Order* a paragraph entitled *"Form and enforcement of the new rules."* There it recognized that non-microwave systems are not licensed by it. However it expressed the view that the

same substantive requirements could, nevertheless, be imposed both upon microwave and non-microwave CATV systems. The Commission stated:

> "While the substantive requirements will therefore be the same for all systems, some differences in form or procedure are necessary in the case of the non-microwave CATVs. First, the obligations will be imposed directly on the CATV system itself, rather than taking the form of conditions on microwave authorizations. Second, enforcement will be through the cease and desist procedures set forth in section 312(b) and (c), or pursuant to section 502, of the act [47 U.S.C. 502, providing for criminal prosecution and fine] and will not include the other sanctions applicable to licensees." (R. 90; 2 F.C.C.2d at 766)

And, of course, Section 312 procedure was followed by the Commission in *Buckeye*, 3 F.C.C.2d 798 (1967), and in *Valley Vision Inc.*, 10 Pike & Fischer R.R.2d 83 (1967). Like the instant case initially, each of these matters involved alleged violations of the distant-signal rules by a CATV system and in each the Commission prescribed measures to provide an expeditious resolution of the matter after a hearing. See also *Mission Cable TV, Inc. and Transvideo Corp.*, 7 Pike & Fischer R.R.2d 419 (1966); *Muskegon Television System and Booth Communications Co.*, 7 Pike & Fischer R.R.2d 415 (1966).

The foregoing demonstrates the Commission's lack of power to restrain allegedly prohibited activities pending completion of an evidentiary hearing as to the actual existence of the charged prohibited activities. It would follow that it certainly does not have the power to issue such an interim restraining order where it is conceded that no prohibited activity has occurred. While there is a paucity of authority as to interim restraining power in a regulatory agency in the absence of a charge of a violation, the lack is easily explainable. It is unheard of to vest in a regulatory agency power to restrain conceded legal activities pending an evidentiary

hearing to determine whether those legal activities should thereafter be permanently restrained on an *ad hoc* basis. Yet, that is the only purpose of the Commission's order for temporary relief in this case.[16]

The proposition that the Commission has authority temporarily to restrain—if indeed temporarily is the appropriate term in the present context—legal activities pending a hearing as to whether they should be permanently restrained or limited becomes even less supportable in the contest of the Communications Act. The provision of the Act most closely designed to deal with a situation approximating the one here presented is Section 316(a). That provision authorizes the Commission to "modify a station license or construction permit" it has issued if, among other reasons, the Commission determines that "such action will promote the public interest, convenience, and necessity, or the provisions of this Act." This power to modify is, for example, available when the Commission has discovered it has permitted a station licensee to transmit signals in a manner that interferes with other legitimate uses of the radio spectrum. The principal difference between such a situation and that here presented is that here the CATV systems are not "licensees." Nevertheless, Section 316(a) expressly requires that before the Commission modifies a license the licensee must be accorded a hearing if he so requests; and Section 316(b) provides that at the hearing "both the burden of proceeding

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[16] The system which the Commission has adopted to regulate CATV in major markets involves both general rules and *ad hoc* "particular orders". (Pet. 17-18). There may, indeed, be serious question as to the Commission's authority to issue such a "particular order" to the extent that it imposes "additional or different requirements" upon a CATV system not in violation of the rules. However that question will not be presented in the instant case unless the hearing now in progress culminates with the issuance of such an order. In the present posture of the case the only question presented is the Commission's authority to impose interim restraints pending its decision as to whether it should ultimately issue such a "particular order."

with the introduction of evidence and the burden of proof shall be upon the Commission" (App. A, *infra*, p. 25).

Accordingly, Section 312 of the Act spells out in specific detail the procedures to be followed by the Commission before it may restrain alleged violations of the Act or of the Commission's rules or of the terms of licenses it has issued. In addition, Section 316 permits the Commission to modify the terms of an outstanding license to "promote the public interest, convenience, and necessity . . ." In each case, if requested, a hearing is required, even "where safety of life or property is involved", at which both the burdens of proceeding and of proof are upon the Commission. The Act therefore deliberately establishes procedures to deal with violations of its provisions or of the Commission's rules or of licenses it has issued. It also covers the modification of previously licensed authority and thereby provides for the imposition of *ad hoc* restrictions on the operations of licensees. None of the procedures so carefully defined permit the Commission to issue interim restraining orders pending a hearing —whether it is directed to the existence of a violation or whether it is directed to the propriety of the modification of a previously issued license. In the light of this statutory scheme the court below was clearly correct in holding that the general rule-making and regulatory provisions of Sections 4(i) and 303(r) conferred no more extensive or arbitrary authority upon the Commission to restrain—pending a protracted hearing—the admittedly legal activities of non-licensees.

IV.

Is it contended (TV Pet., p. 10) that the decision below is in conflict with *Amerada Petroleum Corp. v. Federal Power Commission*, 293 F.2d 572 (C.A. 10, 1961), certiorari denied 368 U.S. 976 (1962), and *R. A. Holman & Co. v. Securities and Exchange Commission*, 299 F.2d 127 (C.A.D. C., 1962), certiorari denied 368 U.S. 976 (1962). However, each of these cases deals with a particular grant of power in

a highly specialized area of regulation, and neither conflicts with the decision below.[17]

The opinion of the District of Columbia Circuit in *Buckeye, supra,* is the primary basis for the contention (Pet. p. 11; TV Pet., p. 8) that the decision below establishes a conflict of circuits. *Buckeye,* however, does not present such a conflict because no question of the power of the Commission to order temporary relief, pending a hearing and decision on the merits, was there presented. Rather, in *Buckeye* a cease and desist order was issued after compliance by the Commission with Section 312 procedures. That case involved an alleged violation of the distant carriage rules by a CATV system, an order "to show cause why it should not be ordered to cease and desist from further operation in violation of Section 74.1107 of the Commission's rules . . .", an expeditious evidentiary hearing disclosing no serious dispute as to the essential facts, a determination that the CATV system was in fact operating in violation of the rules and the issuance of a cease and desist order. *Buckeye Cablevision Inc.,* 3 F.C.C.2d 798, 799, 801, 806 (1966).

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[17] *Amerada* involved an interpretation of Section 4 of the Federal Power Act (15 U.S.C. 717c), which requires natural gas companies regulated under the Act to file notices of rate changes with the Federal Power Commission and authorizes that agency to suspend proposed rate changes for a five-month period. The case merely held that the system of rate regulation established by Section 4 operates to prevent a regulated natural gas company from making additional rate changes during a period when prior rate changes relating to the same gas are suspended. *Holman* involved the revocation with respect to a particular issue of stock of the exemption of offerings of $300,000 or less from the principal registration provisions of the Securities Act of 1933, pending a hearing as to whether violations of the Act or the regulations had in fact occurred. The court's decision confirming the SEC's authority to suspend the exemption for that purpose was based on the fact that the existence of such powers with respect to financial transactions affecting the public has been generally recognized and that Congresss in fact contemplated that the SEC would exercise such powers.

Since no question was raised as to the procedure followed in *Buckeye*, the District of Columbia Circuit properly concluded that the "threshold question of first impression is whether the FCC has jurisdiction to regulate those CATV systems which employ no microwave transmission" (Pet.App. D, p. 70). *Buckeye* was decided on June 30, 1967, more than two months after the instant case. The court's description of the issue before it as one "of first impression" and its failure even to refer to the instant case makes it appropriate to infer that the court—like the Commission approximately six weeks earlier on May 17—properly construed the instant case as being concerned only with the power of the Commission to issue the order for "temporary relief" here involved.

It may be that upon the conclusion of the Commission's hearing in the instant case, a final order will be issued restraining or confining the operations of the respondent CATV systems. Conceivably review of that order will be sought in the Ninth Circuit, and conceivably that court will reverse on grounds inconsistent with the opinion in *Buckeye*. However none of those contingencies has yet occurred; none may ever occur. If all of such contingencies should eventuate, review by this Court on the ground of the existence of a conflict in circuits will be appropriate. Unless and until all of those events do occur review on that ground is plainly premature. *Buckeye* does not deal with the Commission's interim power to restrain legal activities pending a hearing as to the imposition of more permanent restraints—the only issue dealt with by the court below in this case. And the court below did not deal with the ultimate power of the Commission to regulate the activities of non-microwave CATV systems—the principal issue presented in *Buckeye*—or, indeed, with any other issue decided in that case.

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

Respectfully submitted,

MORTON H. WILNER
ARTHUR SCHEINER
HAROLD F. REIS
Landmark Building
1343 H Street, N.W.
Washington, D. C.

Attorneys for Respondent
Southwestern Cable Co.

Of Counsel:

WILNER, SCHEINER & GREELEY
Landmark Building
1343 H Street, N. W.
Washington, D. C. 20005

APPENDIX A

COMMUNICATIONS ACT OF 1934

Sec. 4(i). The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Sec. 312(b). Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States

Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden or proof shall be upon the Commission.

(e) The provisions of section 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

Sec. 316(a). Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: *Provided*, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHWESTERN CABLE CO.,
Petitioner,
v.
UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

No. 21183

MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO.,
and TRANS-VIDEO CORP.,
Petitioners,
v.
UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

No. 21192

Interlocutory Injunction

Before: HAMLEY, BROWNING and DUNIWAY,
Circuit Judges

Southwestern Cable Co., having petitioned this court, pursuant to section 402(a) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C. § 402(a) (1964), and sections 2 and 3 of the Judicial Review Act of 1950, as amended, 64 Stat. 1129 (1950), 5 U.S.C. §§ 1032, 1033 (1964), to review the Memorandum Opinion and Order of the Federal Communications Commission (Commission) released July 25, 1966, as corrected in an Erratum released July 26, 1966; and

Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp., having likewise petitioned this court, and pursuant to the same statutes, to review the described order of the Commission; and

All petitioners having applied to this court, pursuant to section 9(b) of the Judicial Review Act of 1950, 5 U.S.C. § 1039, to issue an interlocutory injunction staying the effectiveness of the described order of the Commission, pending final disposition of the petitions to review, and having obtained from a judge of this court, on August 10, 1966, orders staying the following portions of the described Commission order:

> "IT IS FURTHER ORDERED, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp, ARE DIRECTED TO LIMIT the operations of their respective CATV systems as set forth in paragraphs 24-26 *supra.*"

insofar as the quoted portion of the order refers to petitioners and to paragraphs 25 and 26, with the proviso in each such stay order, that the same is subject to reconsideration by this court in the event that respondent Commission files with this court its objections to the relief granted herein within thirty days of the date of the stay orders; and

United States of America and the Commission, respondents herein, having timely filed a motion for reconsideration of the stay orders and their opposition to the granting of an interlocutory injunction herein, and the matter having come on for hearing before this court on August 22, 1966, on due notice, all petitioners and respondents being represented by counsel; and the court having granted the motion of respondents to consolidate the two review proceedings for all purposes; and having granted the motions of Midwest Television, Inc., Jack O. Gross, and San Diego Telecasters, Inc., for leave to intervene in the consolidated proceedings; and the intervenors having filed a joint opposition

to the application for an interlocutory injunction, and being represented at the hearing by counsel; and

The court finding, on the basis of affidavits of Richard A. Moore and K. C. Hawkins attached to the application of Southwestern Cable Co. for an interlocutory injunction, and the affidavit of K. C. Hawkins attached to Southwestern Cable Co.'s opposition to motion for reconsideration, that if that petitioner is required, pending the disposition of this review proceeding, to desist from adding new subscribers to its presently existing trunk and feeder lines, it in all probability will be unable to extricate itself from its present financial difficulties and may be forced to suspend all operations; and in any event will lose substantial and irretrievable gross income, thereby causing irreparable damage; and

The court further finding, on the basis of the affidavit of Henry R. Goldstein, attached to the application of Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp., that if those petitioners are required, pending the disposition of this review proceeding, to desist from adding new subscribers to their presently existing trunk and feeder lines, they will lose substantial and irretrievable gross income, their franchises may be endangered, and the resulting curtailment of operation will require those petitioners to lay off a substantial number of highly skilled workmen, thereby causing irreparable damage; and

The court further finding that respondent Commission concedes that none of the petitioners is presently in violation of the governing statutes and Commission rules with respect to any of the matters dealt with in the described Commission order, and further finding that the public interest requires that an interlocutory injunction issue, now therefore IT IS

ORDERED, that pending the final disposition of these review proceedings, that portion of the Memorandum Opinion and Order of the Commission released July 25, 1966, as corrected in an Erratum released July 26, 1966, which reads as follows:

"IT IS FURTHER ORDERED, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. ARE DIRECTED TO LIMIT the operations of their respective CATV systems as set forth in paragraphs 24-26, *supra.*"

is hereby stayed insofar as it would require the named companies to desist from adding new subscribers to their trunk and feeder lines in existence on August 23, 1966; and IT IS

FURTHER ORDERED, that the stay orders entered herein on August 10, 1966, are hereby vacated; and IT IS

FURTHER ORDERED, that if the Commission is so advised, it may apply for an order expediting these review proceedings.

DATED: August 23, 1966.

/s/ FREDERICK G. HAMLEY
/s/ JAMES R. BROWNING
/s/ BEN C. DUNIWAY

SUPREME COURT, U. S.

No. 363

SEP 28 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

RALPH S. SPRITZER,
Acting Solicitor General,

DONALD F. TURNER,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

HENRY GELLER,
General Counsel,
Federal Communications Commission,
Washington, D.C. 20554.

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UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

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SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

We address ourselves to the assertion of both respondents (Southwestern Cable Brief, pp. 11-14, 22-23; Mission Cable *et al.* Brief, pp. 4-5, 9-11) that the only question properly presented here is the Federal Communications Commission's power to issue an interim order temporarily halting the expansion of a CATV system and the further suggestion, advanced by one of the respondents (Southwestern Cable Brief,

p. 15), that the case—viewed as involving only this question—will likely become moot before this Court has occasion to decide it. Neither contention is well founded.

1. Even if it involved only the power of the Commission to enter interim orders, there is no substantial likelihood that this case would become moot prior to a decision by the Court. Taking into account the present posture of the proceeding (*i.e.*, the evidentiary portion of the hearing concluded, with the initial decision in the offing) and the further administrative steps which would afford the parties an opportunity to file exceptions to the examiner's decision and to obtain oral argument,[1] it is the Commission's judgment that no decision by the agency can be anticipated before the end of the Court's 1967 term. See *Newport News Co.* v. *Schauffler*, 303 U.S. 54, 58. And, at all events, the remote risk of an intervening agency decision should not defeat review by this Court of the important questions presented.[2] See *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498, 514-516. A definitive

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[1] We note also that the parties could seek reconsideration of the Commission's decision, which in turn could well affect the mootness question. See Section 405 of the Communications Act, 47 U.S.C. 405.

[2] The question discussed here, *i.e.*, the Commission's power to issue interim orders maintaining the status quo pending a hearing (Pet. 17-20), would never come before the Court if the risk of an agency determination of the hearing defeats review. That risk is always present with respect to interim action of this nature.

statement of the Commission's power to issue protective orders—action which seems to us "in the best tradition of effective administrative practice" (*Federal Power Comm'n* v. *Tennessee Gas Co.*, 371 U.S. 145, 155)—is urgently needed for the guidance of the courts, the agency and the affected industries.

2. Nor is this the only issue presented. As our petition attempts to show, the decision below raises the broad question of the Commission's jurisdiction to regulate non-microwave CATV systems by *any* procedures and resolves it in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, (Pet. App. D, pp. 67-80). The opinion in this case makes that abundantly clear by repeatedly asserting that the Commission's statutory powers are limited to licensees and do not authorize action against non-licensees (Pet. App. A, p. 28, n. 7; p. 29). Moreover, both the Ninth Circuit and the District of Columbia Circuit have indicated that they construe the present case as deciding the jurisdictional question contrary to *Buckeye*. In a per curiam order issued on September 6, 1967, which transferred an appeal in *Valley Vision, Inc.* v. *Federal Communications Commission*, No. 21,063, (C.A.D.C.) to the Ninth Circuit pursuant to 28 U.S.C. 2112(a), the District of Columbia Circuit stated (Slip. Op., p. 2):

> The Federal Communications Commission has the power to issue cease and desist orders pursuant to § 312 of the Communications Act to en-

join violations of the CATV regulatory scheme. See *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, —— F. 2d —— (No. 20,274, decided June 30, 1967); *contra*, *Southwestern Cable Co.* v. *United States*, —— F. 2d —— (No. 21,183, 9th Cir., decided April 28, 1967).

And the Ninth Circuit had previously issued an interlocutory injunction staying the effectiveness of the Commission's order that Valley Vision cease and desist from violation of the CATV rules, citing the instant case as sole authority (Pet. 16, n. 12).

Certainly, there can be no doubt of the importance of promptly resolving this conflict; nor is there any arguable claim of probable mootness with respect to this broad question.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

HENRY GELLER,
General Counsel,
Federal Communications Commissions.

SEPTEMBER 1967.

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SUPREME COURT, U. S.

SEP 29 1967

JOHN F. DAVIS, CLERK

No. 428

Supreme Court of the United States

OCTOBER TERM, 1967

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC., and JACK O. GROSS, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

ERNEST W. JENNES
CHARLES A. MILLER
701 Union Trust Building
Washington, D. C. 20005
Attorneys for Petitioners

Of Counsel:
COVINGTON & BURLING
701 Union Trust Building
Washington, D. C. 20005

September, 1967

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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Supreme Court of the United States

OCTOBER TERM, 1967

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

This brief is submitted in response to the briefs in opposition to the grant of a writ of certiorari filed by Southwestern Cable Co. (Southwestern) and collectively by Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp. (Mission).[1]

[1] References to the two briefs in opposition are designated "Southwestern" and "Mission" respectively. References to the appendices to the petition of the United States in No. 363, Oct. Term, 1967, seeking review of the same decision, are designated "U.S. App."

I

Both opposition briefs contend that the court below did not decide that the Federal Communications Commission lacks jurisdiction over CATV but held only that procedural requisites for a temporary stay of CATV expansion had not been satisfied (Southwestern, p. 11; Mission, p. 5). This attempt to construe the decision below narrowly, in order to avoid the conflict between it and the decision of the District of Columbia Circuit in *Buckeye Cablevision, Inc. v. FCC*, No. 20274 (June 30, 1967), fails on every score.

As evidence that the Ninth Circuit did not reach the jurisdictional issue, Southwestern notes that the court defined the question to be the validity of the grant of temporary relief, declined to express its views on unspecified "other issues raised in this proceeding" and set aside the temporary stay without vacating the Commission's order that a hearing be held (Southwestern, p. 11). Not one of these actions is inconsistent with the court's adoption of the position, as the ground for setting aside the temporary order, that the Commission lacks authority over CATV.

The only relief granted by the Commission against respondents was a temporary stay limiting expansion of their systems. The Commission's mere designation of the case for hearing on the issue of a permanent order (an action not challenged by respondents below as working severe and irremediable injury upon them) could not have been set aside by the Ninth Circuit consistent with the longstanding requirement of exhaustion of administrative remedies. *E.g., Petroleum Exploration, Inc. v. Public Serv. Comm'n*, 304 U.S. 209 (1938); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). In any event, the Ninth Circuit's opening description of the review petitions before it as seeking to "set aside *portions* of" the Commission's order establishes its belief that only the temporary stay was under attack by respondents at that

stage (U.S. App. A, p. 21) (emphasis added).[2] The court's reference to questions before it but left undecided must be taken as referring to respondents' further attacks on the Commission's temporary stay, including claimed violations of the First Amendment and the Administrative Procedure Act (Mission, p. 3, n.2).

The best proof of the legal conclusions of the Ninth Circuit is its own opinion. While respondents emphasize a concluding paragraph of the opinion suggesting that procedural infirmities undercut the temporary stay, they entirely ignore the preceding ten paragraphs, the heart of the decision, which dwell upon *Regents v. Carroll,* 338 U.S. 586 (1950), and other authorities and arguments presented to the court to support the proposition that Commission power is limited to station licensees. This lengthy discussion is wholly unnecessary save as it develops the court's basic determination that the temporary stay is invalid because the Commission's powers do not extend beyond station licensees to CATV systems.

The breadth of the Ninth Circuit rationale and the conflict with *Buckeye* are fully borne out by subsequent interpretations of the opinion. Respondent Southwestern finds a contrary inference in the fact that *Buckeye* did not mention the Ninth Circuit decision below as an inconsistent precedent. Although there are numerous possible reasons for its not doing so, speculation is hardly a basis for action by this Court. In any event, the District of Columbia Circuit's recent order in *Valley Vision, Inc. v. FCC,* No. 21063 (Sept. 6, 1967) (reprinted as Appendix A to this brief), shows that it regards the Ninth Circuit decision as being squarely in conflict with *Buckeye.*[3]

[2] If the Ninth Circuit thought it had before it the Commission's decision to order a hearing, the court could scarcely have avoided saying something about the question, however it dealt with the Commission's grant of interim relief.

[3] *Valley Vision* first cites *Buckeye* to support Commission power over CATV and then follows it with the Ninth Circuit decision as a "contra" citation.

The Ninth Circuit also, as we pointed out in our petition for certiorari (p. 7), has plainly shown by *its* interim order of June 29, 1967, in *Valley Vision, Inc. v. United States*, Nos. 21869-70, that it regards its decision below as settling the broad jurisdictional issue. That order cited the present decision as sole authority for staying a final and permanent Commission cease-and-desist order issued after a hearing against violation of the CATV rules; no temporary Commission stay was involved. Southwestern would explain away the *Valley Vision* order by observing that "the issuance by a court of a temporary stay pending decision involves a complex of legal and equitable considerations" (p. 11, n.9). Far from disposing of the *Valley Vision* order, this truism supports the view that the order's sole reliance on the present case means the Ninth Circuit regarded the jurisdictional issue as so plainly settled by its earlier decision as to warrant a stay without further discussion of law or equities.[4]

Finally, we agree with respondents that the narrower question of Commission authority to issue temporary orders is also involved in the present case. Indeed, our certiorari petition argued that the practical impact and legal implications of denying the Commission power to grant interim relief would itself justify the grant of certiorari (pp. 7, 14). But there can be no doubt that the Ninth

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[4] Respondents claim that, when the Commission denied their petition to terminate the hearing, it construed the Ninth Circuit opinion as not passing on the jurisdictional issue (Southwestern, p. 12; Mission, p. 11). The United States and the Commission anticipated and fully answered this point (petition for certiorari, p. 15, n.12). Petitioner Midwest did take the view quoted at length in Mission's brief (p. 12, n.6). However, the Commission did not accept it as the very language of the Commission quoted by Mission (p. 11) makes clear. Moreover, as Mission concedes (*id.*), respondents' position here is wholly inconsistent with their position at the Commission. For they petitioned to dismiss the *entire* Commission proceeding on the ground that the Ninth Circuit decision meant that the Commission had no authority to issue a permanent order.

Circuit's principal rationale is that the Commission lacks authority over CATV, and respondents have not denied that such a question warrants certiorari.

II

One of respondents, Southwestern, has suggested that certiorari be denied because the eventual entry of a permanent order in favor of either side will supersede the temporary stay now outstanding, so that either the case might be rendered moot before decision by this Court or such a decision "will be operative only for a limited period of time" (p. 15). The first of the alternative possibilities, mootness, is unrealistic on the present facts, while the second possibility is not an argument against certiorari.

Even assuming that the advent of a permanent order would technically moot the pending case,[5] there is no practical likelihood that such an order will be entered before the conclusion of this Court's present Term. Reply briefs and findings were submitted to the Commission's hearing examiner on September 8, 1967. In reaching an initial decision, he will have to consider lengthy arguments based on a large record developed during 28 days of hearing and numerous hearing conferences over a period of eight months. Even assuming that the usual lengthy intermediate Review Board procedures are by-passed, 47 C.F.R. § 0.365(a) (1967), exceptions to the initial decision will then be reviewed by the full Commission, 47 C.F.R. § 1.276 (1967), whose practice is to allow full briefing and oral argument. After the Commission's decision, a petition for reconsideration may be filed and the Commission can suspend its decision while it considers the petition. 47 C.F.R. § 1.06 (1967). Given the Commission's heavy workload it will be fortunate if a final decision is reached by next summer so the chance the case may be rendered moot is all but nonexistent.

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[5] *But see* Newport News Co. v. Schauffler, 303 U.S. 54, 58 (1938); Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 514-16 (1911).

Moreover, the Commission's power to grant temporary stays without a plenary hearing is intrinsic to the sound operation of its regulatory scheme, and the issue is one independently deserving of certiorari. Yet because it will always be presented by the grant or denial of interim relief, the possibility of mootness can never be escaped if the Court is ever to pass upon the question.

While the mootness argument is chimerical, it is quite true that the Court's decision might be "operative" in the present case for only a limited time, perhaps only a few months, but Southwestern fails to explain why this furnishes the slightest reason for denying certiorari. The sustaining of the temporary order is vital to petitioners no matter how quickly a permanent order may emerge, because the speed with which customers can be wired into an ongoing CATV system and the difficulty in retrenching could make the permanent order an illusory victory were the temporary stay to lapse for any interval at all.

As the Commission stated in issuing the temporary order in this case:

> "[U]nless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted." 4 F.C.C.2d at 621 (U.S. App. C, p. 50).

If certiorari is denied, it would be no "short period" but an interval of half a year or more during which the CATV systems could expand their reach and undermine existing local television.

Finally, both petitioners and all other litigators in this field have an evident and important long-term interest in the case. A decision by this Court on the Commission's

jurisdiction over CATV will be equally vital to petitioners when and if the present temporary stay is converted into a permanent order of continuing duration. Although the still broader issue of Commission authority over CATV could be reached in other cases involving permanent orders, the very abundance of such cases, present and potential, is all the more reason why this case should be taken to resolve the intercircuit conflict at the earliest opportunity.

III

Since respondents proceed from the incorrect premise that the Ninth Circuit skirted the basic question of Commission authority over CATV, petitioners' claim of error on the broad issue and the importance of that issue stands unchallenged. Moreover, the conflict with *Buckeye* would in any event raise sufficient doubts to warrant resolution by this Court.

Respondents do argue that the Commission lacks power to issue interim stays without a plenary hearing, a point dealt with but briefly in the Ninth Circuit opinion. While our own certiorari petition and that of the United States and the Commission amply demonstrate that the Commission afforded procedural protections both generous and adequate under the law, it may be helpful to answer briefly the principal claims made by respondents.

In support of its position, Southwestern points to a statement by Professor Jaffe that agency power to issue interim orders must derive from statute and to the decisions in *Trans-Pacific Freight Conf. of Japan v. FMB*, 302 F.2d 875 (D.C. Cir. 1962), and *Standard Airlines, Inc. v. CAB*, 177 F.2d 18 (D.C. Cir. 1949) (Southwestern, pp. 16-19). But Professor Jaffe's dictum does not answer the question whether such a power in fact has been granted the Commission, a grant whose exercise in this instance is sustained by analogous de-

cisions discussed in our certiorari petition (p. 10).[6] As to the cases noted by Southwestern, neither of which was cited by the Ninth Circuit, the short answer is that both are distinguishable: *Trans-Pacific* because the Maritime Board lacks the statutory grant of authority possessed by the Commission and because the interim stay was premised on the equities between the parties with no finding that the public interest required it; and *Standard Airlines* because, *inter alia*, the order of the CAB deprived the subject of its CAB-licensed ongoing business instead of merely setting a partial limit on its expansion.

The other principal ground for Southwestern's position on the merits is the Communications Act requirement that full hearings precede cease-and-desist orders under Section 312(b) and modification of licenses under Section 316 (p. 18). 47 U.S.C. §§ 312(b), 316 (1964). The orders contemplated in both cases are final orders permanently affecting the rights of the parties subject to them. It is hardly inconsistent with these sections, and is indeed wholly consonant with judicial procedure for issuance of injunctions, to allow interim orders

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[6] One of these cases, R. A. Holman Co. v. SEC, 299 F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962), is distinguished by Southwestern (p. 22, n.17) on the ground that the power there exercised was "generally recognized," whatever that adds, and had been "contemplated" by Congress, which is an inaccurate inference from the legislative history. Mission (p. 15) seeks to distinguish *Holman* on the ground that the court assumed rather than passed upon the question, although the court's brief treatment more readily suggests it deemed the question simple. Both respondents distinguish Amerada Petroleum Corp. v. FPC, 293 F.2d 572 (10th Cir. 1961), *cert. denied*, 368 U.S. 976 (1962), on the ground that the FPC was exercising an expressly granted power (Southwestern, p. 22, n.17; Mission, pp. 14-15), ignoring the fact that the FPC's action effectively avoided the five-month time limit specified in the statutory grant.

to preserve the status quo upon less exacting formalities than are required for permanent orders – although the formalities in this instance were ample, respondents having both notice and opportunity to submit written pleadings and evidence.

In addition, requiring a plenary hearing before staying the expansion of CATV systems would produce a limitation both incongruous and easily circumvented. Assuming authority over CATV, the Commission could ban all CATV outright subject to exceptions granted after hearings on the public interest, which is just what it has done for some classes of CATV activity. 47 C.F.R. § 74.1107(a) (1957). The Commission's generous decision not to invoke such a ban in all cases but to grant temporary stays only where necessary and upon written evidence and pleadings can hardly *add* procedural requirements in such cases.

Finally, a brief response is called for by Mission's dual intimation that the Commission's failure to seek a temporary stay in court under *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), was to avoid the burden of establishing the public interest, and that the availability of the *Dean Foods* route dilutes the importance of the question of Commission power to issue temporary stays (Mission, pp. 7-9). With respect to the burden of proof, the Ninth Circuit nowhere suggested any doubt about the Commission finding, though such a narrow ground would presumably have been chosen were it available; and had an injunction been sought, the Commission's views on the public interest would have carried the greatest weight in any event. Nor is the availability of a court-granted stay a substitute for Commission action. Quite apart from the Commission's responsibility to act itself in matters within its primary jurisdiction, requiring it

to commence suits in court every time a temporary stay is warranted would be an unnecessary and heavy burden both upon the courts and the Commission.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERNEST W. JENNES
CHARLES A. MILLER
701 Union Trust Building
Washington, D.C. 20005
Attorneys for Petitioners

Midwest Television, Inc.
San Diego Telecasters, Inc.
Jack O. Gross

September, 1967

Appendix A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,063

VALLEY VISION, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

On Appellant's Motion to Dismiss

Decided September 6, 1967

Messrs. Lauren A. Colby and *Gennaro Caliendo* were on appellant's motion to dismiss.

Messrs. Henry Geller, General Counsel, Federal Communications Commission, *John H. Conlin,* Associate General Counsel, and *Robert D. Hadl,* Counsel, Federal Communications Commission, were on appellee's answer to the motion to dismiss. *Mrs. Leonore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for appellee.

Before WILBUR K. MILLER, *Senior Circuit Judge,* and WRIGHT, and LEVENTHAL, *Circuit Judges.*

PER CURIAM: The Federal Communications Commission ordered appellant to cease and desist from the continued carriage of "distant signals" on its CATV system in Placerville, California. Prior to noting an appeal in this Court under § 402(b) of the Communications Act,[1] appellant

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[1] 48 Stat. 926 (1934), as amended, 47 U.S.C. § 402(a) (1964).

instituted an appeal in the Court of Appeals for the Ninth Circuit under § 402(a) challenging the same decision of the Commission. The Ninth Circuit has issued an interlocutory injunction staying the effectiveness of the Commission's order. Appellant now requests that we dismiss his appeal so that he may prosecute the entire matter in the Ninth Circuit.

We do not dismiss but yield *sua sponte* to the Congressional intent that an administrative action be reviewed only by the Court of Appeals in which proceedings were first instituted. 28 U.S.C. § 2112(a).[2] We do so despite our belief that the District of Columbia Circuit has exclusive jurisdiction to review the challenged order. The Federal Communications Commission has the power to issue cease and desist orders pursuant to § 312 of the Communications Act to enjoin violations of the CATV regulatory scheme. See *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, __ U.S. App. D.C. __, __ F.2d __ (No. 20,274, decided June 30, 1967); *contra, Southwestern Cable Co.* v. *United States*, __ F.2d __ (No. 21,183, 9th Cir., decided April 28, 1967). Under § 402(b)(7) the Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review Federal Communications Commission cease and desist orders.[3]

To avoid any possibility of misunderstanding, our action today transferring the appeal to the Court of Appeals for the Ninth Circuit is in deference to § 2112(a) and the need for avoiding unseemly conflict, and does not signal that we

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[2] See *Eastern Air Lines, Inc.* v. *CAB*, 122 U.S. App. D.C. 375, 354 F.2d 507 (1965); *Ball* v. *NLRB*, 299 F.2d 683 (4th Cir.), *cert. denied*, 369 U.S. 838 (1962).

[3] See, *e.g.*, *Tomah-Mauston Broadcasting Co.* v. *FCC*, 113 U.S. App. D.C. 204, 306 F.2d 811 (1962); *Functional Music, Inc.* v. *FCC*, 107 U.S. App. D.C. 34, 274 F.2d 543 (1958), *cert. denied*, 361 U.S. 813 (1959). *Cf. Helena TV, Inc.* v. *FCC*, 269 F.2d 30 (9th Cir. 1959).

are receding from our view that the case properly belongs in the District of Columbia Circuit.

It is so Ordered.

Senior Circuit Judge Miller did not participate in the foregoing opinion.

SUPREME COURT, U. S.

No. 963

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

ERWIN N. GRISWOLD,
Solicitor General,

DONALD F. TURNER,
Assistant Attorney General,

FRANCIS X. BEYTAGH, JR.,
Assistant to the Solicitor General,

EDWARD S. SMITH,
Attorney,
Department of Justice,
Washington, D.C. 20530.

BERNARD GELLER,
General Counsel,

HARRY M. PLOTKIN,
Deputy General Counsel,
Federal Communications Commission,
Washington, D.C. 20554.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 363

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (A. 184–193)[1] is reported at 378 F. 2d 118. The Federal Communications Commission's memorandum opinion and order (A. 146–179) is reported at 4 F.C.C. 2d 612.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1967 (A. 194). The petition for a writ of certiorari was filed on July 13, 1967, and was grant-

[1] "A." refers to the printed appendix filed in this Court under Rule 36(1).

ed on October 23, 1967.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has jurisdiction to regulate non-microwave community antenna television (CATV) systems.

2. If it has, whether in the exercise of such jurisdiction the Commission has power to issue an interim order maintaining the status quo pending a hearing to determine the impact on local "free" television of distribution by a CATV system of television signals from other areas of the country.

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(e), 4(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, 152(a), 153(a), 153(e), 154(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b), are set forth in the Appendix to this brief (*infra*, pp. 57–61).

STATEMENT

This case arises out of an order of the Federal Communications Commission (A. 146, 172–175) requiring respondents, operators of three community antenna television (CATV) systems in San Diego, California, to limit the growth of their systems insofar as they carry Los Angeles television signals into San Diego while the Commission conducts a hearing

[2] Certiorari was also granted in No. 428, this Term, on that date. Petitioners in that case—Midwest Television, Inc., *et al.*—seek review and reversal of the same Ninth Circuit judgment.

to determine whether their further expansion would have an adverse effect on "free" television service in San Diego. The Commission acted under a comprehensive set of rules it had recently adopted to regulate the providing of television broadcast signals by CATV systems (A. 73–83, 128–131). The court below set the order aside on the ground that the Commission had no statutory power to issue such interim orders since CATV systems are not licensees over which the Commission has been given regulatory authority by Congress (A. 184–193).

A CATV system picks up television signals by means of high antennae, located at a point of good reception, or by microwave transmission, amplifies and carries the signals received into a community by means of cable or microwave, and then distributes them by cable, generally strung on telephone or utility poles, to the homes of individual subscribers who pay a monthly fee and, commonly, an initial installation charge.[3] The systems generally carry local stations and also can furnish to subscribers the signals of distant stations which could not otherwise be received

[3] The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such terms shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." 47 C.F.R. 74.1101(a), 2 F.C.C. 2d at 801 (A. 77).

directly off the air by home receivers. In the Commission's view, this extension of signals directly affects its basic plan for allocating "free" television service throughout the United States.

1. THE COMMISSION'S NATIONWIDE TELEVISION ASSIGNMENT PLAN

Section 1 of the Communications Act of 1934 charges the Commission with the duty to "make available, so far as possible, to all the people of the United States, a rapid, efficient, Nationwide and world-wide wire and radio communication service" (47 U.S.C. 151). In aid of this general purpose, the Commission is directed to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (Section 307(b), 47 U.S.C. 307 (b)), and is authorized, "as public convenience, interest or necessity requires," "to establish areas and zones to be served by any station" (Section 303(h), 47 U.S.C. 303(h)).

Pursuant to these responsibilities, the Commission in 1952 adopted a revised nationwide table of television channel assignments, which allocates the use of the available television channels to various communities throughout the country (47 C.F.R. 73.606).[4] The Commission specifically rejected proposals premised on the theory that channel assignments should be clustered in major population centers with smaller com-

[4] Sixth Report and Order in Docket Nos. 8736, *et al.*, 17 Fed Reg. 3905.

munities obtaining reception service solely from the larger cities. 17 Fed. Reg. 3905, 3913. Instead, the table of assignments was designed to maximize the number of individual communities which can have at least one local station, as well as to provide multiple service to as many communities as possible. To this end, seventy UHF (ultra high frequency) channels (14–83) were added in 1952 to the twelve VHF (very high frequency) channels (2–13) which previously had been available for television broadcasting. In most large communities the Commission assigned both VHF and UHF channels. However, the UHF channels were not used as extensively as was expected, particularly where assigned to a community already served by VHF channels, in large part because existing television receivers were not physically capable of receiving UHF signals.[5]

To eliminate this obstacle and help foster the development of UHFs, Congress in 1962, at the Commission's suggestion, adopted "all-channel" receiver legislation (76 Stat. 150, 47 U.S.C. 303(s)) which authorized the Commission to require that all television sets shipped in interstate commerce be equipped to receive "all frequencies allocated by the Commission to television broadcasting." Indeed, the stated

[5] See, *e.g.*, *Second Report on Deintermixture*, 13 Pike & Fischer R. R. 1571; *Jacksonville Journal Co.* v. *Federal Communications Commission*, 246 F. 2d 699 (C.A.D.C.). As of June 3, 1961, only 75 of the 1543 UHF channel assignments were in use, and only 65 cities in the United States were served by three or more television stations. See Notice of Proposed Rule Making in Docket No. 14229, 26 Fed. Reg. 7282.

purpose of this enactment was to promote multiple local television service through use of the UHF portion of the frequency spectrum. H. Rep. No. 1559, 87th Cong., 2d Sess., p. 3. Congress viewed UHF as "not only the best but the only practical way of achieving an adequate commercial and educational television system in the United States." H. Rep. No. 1559, 87th Cong., 2d Sess., p. 4; S. Rep. No. 1526, 87th Cong., 2d Sess., p. 7. This statutory authorization was promptly acted upon by the Commission (27 Fed. Reg. 11698), and all television sets shipped in interstate commerce have, since April 30, 1964, been equipped to receive UHF as well as VHF signals. Considerable stimulation of UHF station growth has occurred as a result of this legislation, but its full potential still remains to be realized (see *infra*, pp. 13–14).

2. THE GROWTH OF CATV SYSTEMS

Community antenna television (CATV) systems have been in existence in this country since the early 1950s. They were originally developed to bring television to remote areas not reached by any television station and to afford multiple service to areas receiving only a limited number of signals. Such factors as distance from originating stations, intervening mountains or other high obstacles, and seasonal or other changes in atmospheric conditions, can impair or make impossible good television reception by ordinary, off-the-air means. Where such conditions prevail, high antennae have been erected at suitable locations, usually on a mountain or other high elevation where reception of the signals of the desired stations is

good. The signals are amplified to insure delivery of signals of acceptable strength, and are distributed by microwave or cable to the community, where they are then carried by cable to the homes of individual customers. At the subscriber's home the incoming cable is attached directly to the receiving connection of a regular television set.

While the early CATV systems customarily offered programs on three channels, the newer systems generally have a twelve-channel capacity, and a twenty-channel and greater capacity is being projected for systems in the near future. The latest estimates place the number of systems in existence at over 1,800, with some 1,600 additional systems franchised but not yet in operation, and over 2,400 applications pending in some 1,200 communities. The distances over which signals are carried has also greatly increased, to as much as 600 miles. Along with the general growth of CATVs, there has occurred, starting in the early 1960s, a rather rapid change in the focus of attention of community antenna system operators. From its inception in simply providing television signals to unserved or underserved areas, CATV development shifted its major emphasis to areas already receiving at least some off-the-air signals of good technical quality. Franchises are being sought, and indeed have already been obtained, in large communities which already receive three or more channels (A. 47–50).[6] CATV

[6] See Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry* (1965); *32d Annual Report of the Federal Communications Commission*, pp. 85–89 (1966).

systems are thus operating or intend to operate in some of our largest cities; in such areas their function is to provide additional or better signals to viewers already receiving multiple service, instead of simply enabling reception of at least some signals in inadequately served areas.

CATV systems have been largely unregulated at the State level. By 1965 only two States, Nevada and Connecticut, had decided to undertake such regulation. Most systems do, however, operate under franchises issued by local governmental authorities. A wide variance exists in the degree of regulation exerted, but typically a franchise arrangement specifies standards with respect to the construction of the system, the stringing of wires, etc. and contains provisions relating to exclusivity, payments to the municipality and duration of the franchise.[7] Not only has State and local regulation of CATV development been quite disparate; it has not—and indeed cannot—address itself to the broader aspects of CATV impact on the nation's television system.

As CATV systems developed, the Commission became concerned that the loss to local stations of audience and advertising, resulting from the importation by CATV systems of the signals of other distant television stations, might adversely affect the maintenance and development of the basic "free" system of television broadcasting provided in the nationwide assignment plan (*supra,* pp. 4–5). In the Commission's view, CATV does not provide a satisfactory substitute for "free" off-the-air service because it is avail-

[7] Seiden, *supra*, pp. 44–47.

able only to those persons who are willing and able to pay a subscriber's fee and who are within reach of cable facilities.[8] In addition, the Commission took into account the fact that CATV systems ordinarily originate no local programming and thus do not afford an outlet for the expression of local views or the dissemination of news and information of local interest—useful services provided by local stations.

3. THE EVOLUTION AND ADOPTION OF THE COMMISSION'S CATV RULES

In 1958, the Commission began an inquiry to gather data and to examine, among other things, the extent of its own powers to regulate CATV systems. It determined in 1959, as a result of that inquiry, that CATV systems are not engaged in broadcasting and that they are not common carriers. Since the record failed to show a sufficient impact by CATV systems on existing television broadcasting to warrant an assertion of regulatory jurisdiction at that time, the Commission, in disclaiming authority over certain aspects of CATV, chose not to determine whether, on the impact ground, it had jurisdiction over other aspects of this new development in communications. *CATV and TV Repeater Services*, 26 F.C.C. 403, 431.[9]

[8] It has not proved economically feasible to extend CATV service to sparsely populated areas.

[9] The Commission also disclaimed jurisdiction over CATV on certain other grounds. It further held that it lacked authority to deny a common carrier microwave authorization to relay television signals to CATV systems. It reversed this ruling in *Carter Mountain Transmission Corp.*, 32 F.C.C. 459, affirmed, 321 F. 2d 359, 364 (C.A. D.C.), certiorari denied, 375 U.S. 951.

In 1962, the Commission instituted a rulemaking proceeding in which the impact of CATV on broadcasting and the Commission's channel-assignment plan was reexamined in connection with the licensing of microwave relay facilities which serve CATV systems. Since microwave transmissions involve use of the air waves, it is undisputed that the Commission has jurisdiction over such facilities, and, as a result of this proceeding, the Commission concluded that microwave relay facilities serving CATVs would be licensed only where it was shown that the CATV systems served had agreed to carry the programs of local television stations (the "carriage" requirement) and would refrain from duplicating such programs by providing identical signals from distant stations (the "non-duplication" requirement).[10] In the course of this lengthy and comprehensive rulemaking proceeding, the Commission invited and carefully considered the views of all affected parties. Elaborate economic studies prepared under the auspices of the National Association of Broadcasters and the National Community Television Association were submitted, and, in addition, an economic consultant was engaged by the Commission to analyze the issues posed by the development of CATV and to submit his recommenda-

[10] See also *Carter Mountain Transmission Corp., supra*, where, after an evidentiary hearing, the Commission found that the sources of revenue essential to the local television station would be substantially eliminated by the unrestricted growth of CATV systems in the area. To prevent the demise of the local station the Commission refused to grant licenses for a microwave facility to serve the system unless carriage and non-duplication measures were adopted to lessen the impact on that station.

tions.[11] At the conclusion of the proceeding the Commission found that the carriage and non-duplication requirements were necessary to ameliorate the adverse impact on existing and potential television service and were at the same time "appropriate as means designed to create reasonably fair and open conditions for competition between CATV and broadcasting stations as alternative ways of making television programs available to the public." First Report and Order, 38 F.C.C. 683, 713.

Simultaneously, on April 22, 1965, the Commission released a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971, 30 Fed. Reg. 6078, 1 F.C.C. 2d 453, proposing to assert jurisdiction over all CATV systems, whether or not they use microwave relay to distribute the signals they provide, and to regulate the entry of CATVs carrying "outside" or distant signals into the major markets. Parties who were urging the adoption of rules to govern CATV systems pointed to the explosive growth of CATV operations and contended that further unregulated CATV development would, by fragmenting the available audience, endanger both local "free" television service and the development of multiple television service utilizing both VHF and UHF channels in the larger communities.

On March 8, 1966, after receipt of voluminous comments, the Commission released its Second Report and Order in Docket No. 15971, in which it adopted new

[11] Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry* (1965).

final rules relating to the regulation of CATV systems (31 Fed. Reg. 4546, 2 F.C.C. 2d 725; A. 1–96). Upon a comprehensive consideration and discussion of its jurisdiction and the bases of its action, the Commission concluded that it has jurisdiction over all CATV systems, whether microwave or cable (A. 4–10, 69–73); found that it was appropriate—and necessary in the public interest—to assert its jurisdiction at that time (A. 10–21); promulgated final revised rules requiring the carriage of local television stations (A. 28–32) and non-duplication (A. 23–28) of their signals; adopted a rule providing for hearing procedures to explore the impact of CATV operations, particularly the importation of distant signals, in the 100 major television markets, including provisions for maintaining the status quo pending an evidentiary hearing (A. 46–59); and stated that there were certain areas of concern which would be dealt with on an *ad hoc* basis (A. 40).

The Commission held that it had statutory jurisdiction over non-microwave CATV because it constitutes interstate communication by wire (47 U.S.C. 152(a), 153(a)) which physically intercepts and extends television signals, and, by so doing, directly affects and may undermine the channel-allocation plan for off-the-air local television service, including UHF stations, established by the Commission under the Act. Thus, the Commission determined, CATV systems, whether microwave or not, are subject to its regulatory powers (47 U.S.C. 154(i), 303(f), 303(r) and 312(b)).

In arriving at this conclusion, the Commission

noted that Congress in the 1962 all-channel receiver legislation had made the judgment that the widest possible development of UHF is the best way of achieving adequate national television service, comprised of a large number of local stations, including both commercial and educational stations (A. 46). It also noted that new UHF stations, particularly independent (*i.e.*, non-network) stations in communities with multiple television service, faced a difficult road in this crucial period in UHF development (A. 50). CATV systems might have a significant adverse effect on such stations by bringing into their communities the non-network programming of independent stations from cities such as New York and Los Angeles. This could fragment the local station's already limited audience, and thus impair its ability to earn advertising revenues and to serve the local community (A. 50–51). And CATV systems, the Commission noted, unlike the local stations, have not traditionally paid for the programming they provide, giving them a competitive advantage over UHF and independent stations (A. 54–56).[12] The Commission found that since UHF development was already proceeding in at least 163 communities or areas—most of which

[12] In the Second Report and Order the Commission noted that it might be necessary to revise certain of its CATV rules in the light of pending developments with respect to the copyright laws (A. 44–45). Proposals for legislation relating to CATV copyright liability are presently pending in Congress, and the question of such liability under the existing copyright laws is involved in *United Artists Television, Inc.* v. *Fortnightly Corp.*, 377 F. 2d 872 (C.A. 2), certiorari granted, December 4, 1967, No. 618, this Term.

were located within the top 100 television markets—any halt or curtailment of the growth of UHF development caused by the importation of signals from other areas into these communities by CATV systems would be particularly significant, for they contain about 90 percent of the television homes in the country (A. 48, 59).

Several other factors which "might lead to results inconsistent with the public interest" also motivated the Commission to assert jurisdiction over CATV (A. 51). As the Commission pointed out, CATV systems cannot economically extend their lines to rural areas, do not generally serve those who cannot afford its monthly fees and installation charges, and do not presently offer a forum for the expression of views on matters of local interest (A. 51). By potentially impairing the viability of "free" local broadcasting in a community, CATV might reduce or deny television service to many viewers.

However, the Commission concluded "that on the record before us, it is not possible to give a definitive answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets" (A. 49). It stated (A. 52):

> * * * [W]e have reached no final conclusion in this area—i.e., the effect of CATV development in the major market on UHF broadcasting. But we have concluded that there is a substantial problem of great significance to the public interest, which must be thoroughly ex-

> plored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if that growth is of a high order, its impact on UHF development may be most serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and most effective use of radio." In view of these conclusions, we think that our course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."

It therefore determined that there should be full exploration, in an evidentiary hearing, of the impact of any new proposed CATV system extending signals from beyond the Grade B contour [13] of the originating station into the Grade A service area of any station located in one of the country's largest 100 television

[13] A Grade B contour is the imaginary line along which a good picture may be expected for 90 per cent of the time at the best 50 per cent of the locations. A Grade A contour defines the area at the perimeter of which a good picture is received for 90 per cent of the time at the best 70 per cent of the locations. See *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, 515–516 n. 12 (C.A.D.C.).

markets.[14] Section 74.1107 of the rules was adopted to effectuate this determination (A. 80–81). Subsection (d) of that rule provides that the general prohibition does not apply to any signal which was being supplied by a CATV system to its subscribers on or before February 15, 1966.[15] However, this "grand-

[14] The Commission left the question of the importation of distant signals into markets other than the top 100 for resolution upon specific complaint, stating (A. 59):

"Admittedly, there can be substantial problems affecting the public interest where the CATV system proposes to extend the signals of broadcast stations beyond the Grade B contour into areas below the top 100 markets. But there are differences between the two situations which call for different procedures. In markets below the top 100, the independent UHF (or VHF) station is much less likely to develop; the stations in such markets are apt to be three or less in number and network affiliated. This means, in turn, that the non-duplication provision is effective (since network programing will be significantly involved), and protection of a station's network programing should contribute very substantially to insuring its continued viability. It would appear that network programing will continue to be available in such markets; in the unlikely event that such programing becomes unavailable because of CATV impact, there would appear to be other appropriate remedial action which can be taken. Further, it is in the markets below 100 that there may be underserved areas where CATV can make its most valuable and traditional contribution. Indeed, the market division which we adopt is really a division between CATV in its traditional sense and the new, revolutionary facet of CATV, as posed by its entry into the major markets. It is the latter which peculiarly requires the most thorough examination in the context of an evidentiary hearing."

[15] On February 15, 1966, the Commission had released a public notice in which it announced that new rules would shortly be adopted to apply to non-microwave CATV systems as well as those using microwave, and announcing that February 15 would be the "grandfathering" date (see A. 60–61). Indeed, one of the Commission's concerns, in fashioning its CATV rules, was to avoid disruption of the viewing habits of CATV subscribers (see A. 23).

father" clause is subject to the proviso that such a CATV system shall not extend its service into "new geographical areas" if the Commission finds, upon petition filed by a television broadcast station in the area, that such extension of service is contrary to the public interest. Provision is also made for special situations calling for temporary relief (Section 74.1107(d)):

> [T]he Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

The purpose of this provision for interim relief against the expansion of existing systems was to effectuate the Commission's belief that an existing CATV system "should [not] be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution [in an evidentiary hearing] of the serious issues presented" (A. 61).

Finally, recognizing that in this new and rapidly developing field it could not deal in advance with every potential area of concern, the Commission, in Section 74.1109 of the rules (A. 81–82), made provision for special situations which would justify relief from the requirements of the rules or which would require imposition of "additional or different require-

ments" on an *ad hoc* basis. Here again temporary relief to maintain the status quo pending an evidentiary hearing was authorized.

Although the rule concerning CATV entry into the major markets related only to the extension of a signal beyond the Grade B contour of the originating station, the Commission also directed itself to the situation where two major markets are so located that the Grade B contour of a station in one already penetrates the other. The Commission recognized that the same problems may exist in such a situation as in the case where there is no such penetration, and it decided to deal with such situations on an *ad hoc* basis (A. 62, n. 69):

> If two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise.

In adopting these rules the Commission stressed that what it sought was an accommodation between the legitimate claims of CATV systems and the television stations that would serve the overall public interest in

encouraging "the larger and more effective use of radio" (47 U.S.C. 303(g)). Thus, notwithstanding certain inhibitions on CATV development which the rules impose, the Commission pointed out that CATV systems remained completely free to perform what theretofore had been their primary function—bringing new service to underserved areas and improving the quality of existing service in other localities. And where restrictions were imposed, as for example on the importation of distant signals into major markets, the rules contain no outright prohibition but only seek to delay development and further encroachment until "a full exploration of the facts of each case" has been conducted (A. 62–63).[16]

4. THE PRESENT CASE

Respondents operate three CATV systems in San Diego, California, the 54th largest television market in the United States. They have grandfather rights under the Commission's rules and presently carry the signals of between six and eight Los Angeles television stations into various sections of San Diego. San Diego has two VHF television stations (KFMB–TV

[16] Commissioner Bartley dissented on the ground that the Commission lacks jurisdiction to regulate non-microwave CATV; Commissioner Loevinger expressed doubts as to jurisdiction, but joined in the adoption of the rules; Commissioner Cox, on the other hand, favored even stronger regulation, and thus dissented in part from the substantive provisions of the duplication and distant signal rules (A. 84; 95–96; 84–95). Subsequently, the Commission denied petitions for stay of its rules (A. 97–110, 3 F.C.C. 2d 816), and, except for perfecting modifications, denied petitions for reconsideration (A. 111–145, 6 F.C.C. 2d 309).

and KOGO–TV) (CBS and NBC, respectively), and one independent UHF station (KAAR). A construction permit has also been issued for another UHF station (KJOG–TV), and an application is pending for an educational UHF station.[17]

Midwest Television, Inc., licensee of KFMB–TV, filed a petition with the Commission under Section 74.1107(d) of the rules alleging that respondents were expanding rapidly into new geographical areas, that the viability of local television was being threatened, and that this expansion should be limited. The permit holder for the UHF station to be constructed supported the petition. Respondents claimed that they were not extending Los Angeles signals in violation of Section 74.1107 because San Diego is within the Los Angeles stations' Grade B contour, and that in any event respondents' grandfather rights permitted them to expand.

In a Memorandum Opinion and Order released July 25, 1966, corrected by an erratum (A. 146–179; 4 F.C.C. 2d 612), the Commission found this "a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area," so far as the question of the effect of the CATV operations on the growth of UHF was concerned.[18] Under Sections 74.1107 (a) and (d),

[17] The area is also served with ABC network programs by a VHF station in Tijuana, Mexico.

[18] The question of whether the Grade B contours of the Los Angeles stations reach into San Diego was not resolved by the Commission, since the Commission decided that a hearing was needed in any event to resolve the question of the impact of CATV expansion in San Diego. It held that the policy con-

and 74.1109 of its rules, the Commission sought to maintain the status quo in San Diego by directing respondents, pending the hearing, not to carry Los Angeles signals into new geographical areas they were not serving on the grandfathering date, February 15, 1966. Respondents were permitted to extend their systems, but could offer subscribers to the extended systems only San Diego and Tijuana stations. New subscribers in geographic areas where the systems had been operating prior to February 15, 1966, could be offered both Los Angeles and San Diego-Tijuana signals.

Respondents petitioned the court of appeals for review of the interim restriction on expansion of their systems, contending that temporary relief of this kind is not authorized by the Communications Act.[19] The Ninth Circuit set aside the Commission's order insofar as it granted interim relief.[20] More broadly, however, it held that the interim order was not justified by the Commission's general rulemaking authority under Sections 4(i) and 303(r) of the Communications Act (47 U.S.C. 154 (i) and 303(r)) because

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siderations are the same whether or not the Grade B contours of the Los Angeles stations reach San Diego (A. 164–165).

[19] Respondents Trans-Video, Mission and Pacific urged that the Commission lacked jurisdiction to regulate CATV systems, and, in addition, that its regulations violated the First Amendment, and that the rule invoked by the Commission was invalid because it was adopted without adequate notice.

[20] The lower court granted a stay of mandate pending review by this Court, upon condition that a petition for a writ of certiorari be filed by June 13, 1967. By order of June 13, 1967, Mr. Justice Brennan extended the period for filing the petition to July 13, 1967, and it was filed on that date.

those provisions "are to be measured by the Act and its structure and purpose" (A. 188). Citing *Regents v. Carroll*, 338 U.S. 586, the court ruled that the Commission's powers with respect to the regulation of broadcasting are limited to the licensing of stations and related functions, explicitly stating that "sections 4(i) and 303(r) are limited to the scope of the Commission's licensing authority" (A. 192). Since non-microwave CATV systems do not involve licensed activities, the Commission, in the court's view, lacked authority to prevent respondents from expanding pending the hearing it had ordered.[21]

SUMMARY OF ARGUMENT

I

Comprehensive powers have been conferred upon the Federal Communications Commission by Congress

[21] After the decision of the court below, respondents moved to terminate the Commission's hearing on the ground that under the court of appeals' decision the Commission is barred from imposing any restrictions or limitations on the operations of their CATV systems. The Commission denied the petition on the ground that, whatever the rationale of the decision and the language of the opinion, the court's judgment was in terms limited to the power to issue interim orders.

In an initial decision issued October 3, 1967, a Commission hearing examiner concluded that the need for restricting the growth of respondents' systems in San Diego had not been established. *Midwest Television, Inc.*, 11 Pike & Fischer R.R. 2d 273. Southwestern thereupon requested the Commission to lift its interim suspension, but the agency declined to do so, pointing out that the examiner's conclusion did not constitute a final determination, that other parties had indicated they would file exceptions and request oral argument and that no showing sufficient to warrant vacation or modification of the earlier order had been made. *Midwest Television, Inc.*, 11 Pike & Fischer R.R. 2d 721.

to enable that agency to deal effectively with new developments in the continuously evolving uses of radio. These sweeping powers clearly comprehend Commission jurisdiction to regulate community antenna television systems in the public interest. The Communications Act applies to "all interstate and foreign communication by wire or radio * * *." CATV systems receive signals from distant stations, amplify them and transmit them by wire to the home receivers of their subscribers. They are thus clearly engaged in interstate communication by wire, and are therefore subject, under the Act, to Commission regulation.

Moreover, in intercepting and extending television signals, CATV systems directly affect the allocation of television service established by the Commission in carrying out its responsibility to prescribe areas or zones to be served by new stations, and to provide a sound, efficient and equitable distribution of radio service among the States. Since their activities directly impinge upon broadcasting, CATV systems are subject to the Commission's broad regulatory authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions." Contrary to the view of the court below, the Commission's powers are not confined to licensing and common carrier regulation. Rather, those powers extend to all persons subject to the Act whose activities directly relate to and affect broadcasting. CATV systems plainly fit into that category.

There are only a limited number of very high frequency (VHF) channels available and the Commission has looked to the more numerous ultra high frequency channels (UHF) to supply local television requirements. Congress endorsed this approach when it adopted all-channel receiver legislation in 1962 to encourage UHF development. Because CATV may fragment a local station's audience, thus impairing its ability to earn revenues and threatening its viability as a broadcaster serving the local community, the Commission concluded that CATV has the potential for changing the entire pattern of television broadcasting. But neither the Commission nor the industry has yet been able to predict what effect this new development will actually have on "free," off-the-air television. Recognizing that the growth of CATV, particularly in the large cities, poses substantial problems of considerable significance to the public interest which must be thoroughly explored, the Commission has asserted jurisdiction in a manner which will permit it to study in detail the potential impact of CATV in particular markets and to preserve the status quo while engaged in that task.

In view of its sweeping statutory powers, it was not necessary for the Commission to find specific mention of CATV in the Act or catalog it as broadcasting or common carrier service. For the Communications Act established a flexible regulatory scheme designed to solve future problems. Congress deliberately conferred on the Commission the authority to deal with rapid and novel technological developments in the communications industry. This

sort of approach is correctly reflected in *Buckeye Cablevision, Inc.* v. *Federal Communications Commission,* C.A.D.C., No. 20,274, decided June 30, 1967 (Pet. App. D 67–80), which, in upholding Commission jurisdiction over CATV, conflicts with the Ninth Circuit's decision in the instant case. Similar agency authority had been found by this Court to exist in other areas of comprehensive federal regulation. Nothing in *Regents* v. *Carroll,* 338 U.S. 586, relied on by the court below, is to the contrary. There the court simply stated in passing that the Commission's remedial powers under the Act centered on its licensing functions. This observation, made in a case which is plainly distinguishable as a factual matter, hardly should be read as preventing the Commission from regulating a form of interstate communication by wire which significantly extends the signals of licensed stations and thus has a direct effect on the Commission's plan for the allocation of television service in this country.

II

The Commission's broad authority to regulate CATV systems incorporates all that is necessary to prevent frustration of the Act's purposes. That authority necessarily includes, therefore, the power to maintain the status quo in particular markets while the Commission studies, on an *ad hoc* basis, the potential impact of CATV importation of signals from distant stations. To control the expansion of systems without grandfather rights in the top 100 television markets, the Commission has sought to preserve the status quo by general rule. In special situations, such

as presented here, it has adopted a flexible, *ad hoc* procedure which achieves precisely the same result it could obtain by general rule. But rather than impose in all cases a general stay on expansion, to which CATV systems must seek exception, it has left CATV systems like those of respondents free to expand subject only to a finding, after complaint and notice, of the need for a particularized stay in the particular market.

Contrary to the view of the court below, the fact that the Commission has statutory authority to issued cease-and-desist orders (47 U.S.C. 312) against licensees is not of significance here. A cease-and-desist order is permanent in nature, issues only after an evidentiary hearing results in the finding of a violation, and would not be effective to maintain the status quo pending Commission exploration of the potential impact of CATV expansion in a particular market. Nor is interim relief of the kind here ordered analogous to a temporary cease-and-desist order issued to preserve the status quo pending adjudication of an alleged violation. Interim stays are here imposed only to stabilize a rapidly changing situation while the Commission explores what action, if any, should be taken.

Finally, the situation here is quite unlike that where an agency with significantly more limited powers must apply to the courts under the All Writs Act for interim relief. *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. Unlike the Federal Trade Commission Act involved in *Dean Foods*, the Communications Act confers comprehensive regulatory power on the Commission. As in *R. A. Holman Co.* v. *Securities and Exchange Commission*, 299 F.

2d 127 (C.A.D.C.), certiorari denied, 370 U.S. 911, the Commission has authority, upon a reasonable balancing of public and private interests, to prevent possible injury to the public while it considers the appropriate standard for conduct in a regulated industry. Whether achieved by general rule or *ad hoc* order, the result is the same—CATV systems cannot expand in certain areas until the Commission has had an opportunity to determine whether such expansion would be in the public interest. Such flexibility in remedies is of the very essence of the regulatory authority conferred on the Commission by the Communications Act of 1934 and is critical to the effective performance of its responsibilities. Any other approach would run a serious risk of rendering Commission regulation of CATV nugatory, by presenting the agency with a *fait accompli,* resulting from the expansion of systems during the pendency of hearings, which could not, as a practical matter, be undone.

ARGUMENT

The scheme of regulation created by the Communications Act of 1934 was designed to meet new developments in the continuously evolving uses of radio and television. CATV is such a development. Because it physically intercepts and extends television signals, it forms a link in the nation's television system and has a direct impact on the community-oriented pattern of channel allocations established by the Commission in the public interest. But the rapid growth of CATV systems, particularly in metropolitan areas, presents novel problems. Neither the Commission nor

the industry has yet been able to estimate fully what the effect of this new development on broadcasting will be. Accordingly, the Commission has endeavored not simply to preserve the existing plan for local broadcasting, but to study in detail the impact CATV may have in particular important markets. The general regulations it has adopted and their application in this particular case so as to maintain the status quo pending consideration of the situation in the San Diego market, rest upon the same statutory basis—the flexible, comprehensive and expansive powers which Congress delegated to the Commission in the Communications Act of 1934 in order "to promote and realize the vast potentialities of radio * * *." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217; see *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203.

I. THE COMMUNICATIONS ACT OF 1934 CONFERS AUTHORITY ON THE COMMISSION TO REGULATE COMMUNITY ANTENNA TELEVISION SYSTEMS

Once the nature of CATV and its potential impact on broadcasting is comprehended, it is virtually self-evident that the administrative agency charged by Congress with the regulation of broadcasting, and endowed with sweeping authority to perform that function, has jurisdiction to regulate this new and significant development in the communications field.[22]

[22] Indeed, the Commission's authority to regulate CATV systems derives from some of the same statutory sources as its authority to establish and administer a nationwide plan for the allocation of television channels to various communities across the country. See *Logansport Broadcasting Corp.* v. *United*

The statutory basis for Commission jurisdiction over CATV systems can be succinctly expressed: CATV constitutes interstate communication by wire (47 U.S.C. 152(a), 153(e)) since the systems physically intercept and extend television signals. By so doing, they directly affect and threaten to disrupt the allocation plan for off-the-air television service established by the Commission under the Act (47 U.S.C. 303 (h) and (s), 307(b)). CATV is therefore subject to the Commission's general regulatory powers (47 U.S.C. 154(i), 303 (f) and (r), 312(b)).

Congress's purpose to include within the scope of the Communications Act all forms of interstate communication by wire or radio, then existing or subsequently developed, is indisputably clear. Section 2(a) (47 U.S.C. 152(a)) expressly declares that the Act's provisions "shall apply to *all* interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio * * *" (emphasis added). CATV systems come squarely within this language. They are plainly engaged in interstate communication by wire, for that term includes "the transmission of * * * signals, pictures, and sounds of all

States, 210 F. 2d 24 (C.A.D.C.). There can be no question as to its jurisdiction to condition the licenses of microwave relay systems designed to serve CATVs on the meeting of certain requirements in order to protect the integrity of this plan. See, *e.g.*, *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951; *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 352 F. 2d 729 (C.A.D.C.). And there is no significant distinction in effect on the channel-allocation plan between a CATV system served by a licensed microwave relay, and a system which captures the unrelayed signals of licensed television stations directly from the air waves.

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kinds by aid of wire, * * * including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission" (47 U.S.C. 153(a)).[23]

CATV systems operate in interstate commerce, as part of the continuous stream of interstate communications. They often receive programs which originate in other States, amplify them and transmit them to the home receivers of their subscribers. Moreover, the fact that some systems might be located and receive signals from within a single State would not serve to defeat the Commission's jurisdiction. *Buckeye Cablevision, Inc.* v. *Federal Communications Commission,* C.A.D.C., No. 20,274, decided June 30, 1967; *Idaho Microwave Inc.* v. *Federal Communications Commission,* 352 F. 2d 729 (C.A.D.C.). Cf. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266; *Fisher's Blend Station, Inc.* v. *State Tax Commission,* 297 U.S. 650.[24] CATV systems, as the Com-

[23] See also 47 U.S.C. 153(b), which defines a "radio communication" as "the transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services * * * incidental to such transmission." Although the Commission determined that CATV systems were engaged in interstate communication by wire, it also stated, in the Second Report and Order (A. 70, n. 1), that "[s]ince CATV operations clearly fall within sec. 3(a) and/or sec. 3(b), a determination of their precise status is not essential" to resolution of the jurisdictional question. CATV systems are plainly "incidental" to the transmission of radio communications, and could have been found subject to the regulatory authority of the Commission on this ground as well.

[24] See also *California Interstate Telephone Co.* v. *Federal Communications Commission,* 328 F. 2d 556 (C.A.D.C.); *Ward*

mission found, cannot properly be analogized to passive roof-top and backyard aerials (A. 56). CATV facilities consist of tall antennae linked with miles of cable and sophisticated receiving and amplification equipment. Both technically and commercially they constitute communications systems separate and apart from the home receivers they serve.

CATV operations directly affect the allocation of television service established by the Commission in carrying out its responsibility "as public convenience, interest, or necessity requires" (47 U.S.C. 303) "* * * * to establish areas or zones to be served by any station" (47 U.S.C. 303(h)); and to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same" (47 U.S.C. 307(b)). *Logansport Broadcasting Corp.* v. *United States,* 210 F. 2d 24 (C.A.D.C.). To implement these statutory provisions, the Commission adopted a table of channel assignments aimed at providing television broadcast stations in as many communities as possible. It established a system of priorities to guide its assignments [25] and took into account geographical,

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v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), certiorari denied, 371 U.S. 820.

[25] As set out in the Sixth Report and Order in Docket Nos. 8736, *et. al.*, 17 Fed. Reg. 3905, 3912, these priorities are:

Priority No. 1: To provide at least one television service to all parts of the United States.

Priority No. 2: To provide each community with at least one television broadcast station.

Priority No. 3: To provide a choice of at least two tele-

economic and demographic conditions. 17 Fed. Reg. 3905, 3912. Because the number of available VHF channels is quite limited, the Commission looked to the more numerous UHF channels (14–83) to supply local requirements. Congress endorsed this approach when it adopted the all-channel receiver legislation in 1962 for the specific purpose of encouraging UHF development (76 Stat. 150, 47 U.S.C. 303(s)). See H. Rep. No. 1559, 87th Cong., 2d Sess., pp. 2–6; S. Rep. No. 1526, 87th Cong., 2d Sess., pp. 2–5. The fundamental premises of the channel-allocation plan were that service would be free and directly off-the-air to the home receiver; and that the economic fate of local stations would be determined substantially on the basis of competition for viewers among similarly situated stations.

Broadcasting derives its revenues from advertising. In an economic sense, the "customers" of television stations are not the audience to which they furnish programming, but advertisers who seek to reach the audience which the stations attract. Essential to effective programming which will attract audiences is a reasonable degree of exclusivity for the programs

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vision services to all parts of the United States.

Priority No. 4: To provide each community with at least two television broadcast stations.

Priority No. 5: Any channels which remain unassigned under the foregoing priorities will be assigned to the various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities.

broadcast,[26] and exclusivity is an important element in the costs of program material. To the extent that CATV systems decline to carry local stations and duplicate their programming, or import multiple signals from distant stations, they tend to deprive local stations of some of the program exclusivity they need to attract audiences. As audiences are reduced, the local stations may ultimately suffer a serious loss in advertising revenues. CATV therefore has the potential of diluting a local station's audience, thus impairing its ability to earn revenues and threatening its viability as a broadcaster serving the local community. See *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951.

In addition, the Commission has found that CATV at the present time does not normally serve as an outlet for local self-expression or provide programming tailored to local needs (A. 51). The Commission's allocation of television facilities pursuant to Sections 303 and 307(b) of the Act is predicated upon the "desirability of having a large number of local outlets with diversity of control over disseminating sources rather than a few stations serving vast areas and populations" (First Report and Order, 38 F.C.C. at 699–700). It has long rejected, as inconsistent with

[26] The Communications Act provides for some exclusivity by providing that no broadcasting station shall "rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station" (47 U.S.C. 325(a)). This provision does not apply to CATV because, although CATV systems transmit signals, they do not broadcast them. *CATV and TV Repeater Services*, 26 F.C.C. 403, 431.

the congressional design and with the most effective use of the air waves in the public interest, the view that channel assignments should be clustered in major cities from which satellite communities within an appropriate range would obtain service rather than having broadcast facilities of their own (First Report and Order, 38 F.C.C. at 700).

Thus, if the ultimate effect of CATV operations in a major community in fact proved to be the substitution for local independent stations of independents from the very largest cities, like New York or Los Angeles, this would not only be "contrary to sound allocation principles, long established in section 307 (b) of the Act" (A. 51), but also a "clear frustration of the congressional purpose recently stated of making available in areas such as Philadelphia additional broadcast stations to meet the 'important needs' for 'local programming and self-expression'" (A. 51). H. Rep. No. 1559, 87th Cong., 2d Sess., p. 3; S. Rep. No. 1526, 87th Cong., 2d Sess., p. 4.

When the signals of stations are extended far beyond their normal broadcasting areas into communities assigned other stations, the fundamental basis of the Commission's channel-allocation plan is endangered. Essential to that plan was a deliberate choice to provide the maximum number of viable local stations. CATV, however, has the potential, if wholly unfettered, for changing the entire pattern of television broadcasting in this country. Several stations might become concentrated in a few large centers from which their signals would be extended by microwave and cable across the country. Had the Commission not

acted when and as it did, the nationwide plan for community broadcasting and the congressional design to achieve this through UHF might have been displaced by technological and economic centralization of television broadcasting in a few large cities, and the whole system of "free" off-the-air television service might thus have been undermined. To a substantial degree, only those financially able to afford to pay monthly CATV charges and in an area where CATV service could economically be provided would have been able, in the wake of the demise of local stations, to receive television service.

It cannot seriously be maintained that the Commission's powers are so limited that it must remain passive while new methods of extending television signals threaten such a disruption of broadcasting patterns. The agency was created to foresee, consider and provide for precisely such developments. Congress was fully aware of the dynamic and unforeseeable potentialities of radio waves. As this Court had occasion to point out, in "the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219; see also *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138.[27]

Congress established the Commission for "the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United

[27] The statutory development of radio regulation and the purposes of the Communications Act are summarized in *National Broadcasting Co.* v. *United States,* 319 U.S. at 210–214.

States a rapid, efficient, Nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *" (47 U.S.C. 151). Its explicit authority to established the allocation of television service (47 U.S.C. 307(b)) is implemented by a specific directive in Section 303 (47 U.S.C. 303) that, "[e]xcept as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act * * *;

* * * * *

(h) Have authority to establish areas or zones to be served by any station;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *."

These provisions are reinforced by further express authorization for the Commission to effectuate its functions. Section 4(i) (47 U.S.C. 154(i)) provides that the "Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions." Its power to issue cease-and-desist orders for violations of the Act and regulations thereunder extends to "any person" who has committed a violation (47 U.S.C. 312(b)).

Under this comprehensive statutory scheme, the Commission was not only empowered to consider the

effect of CATV on broadcasting—it had a clear obligation to do so. Upon finding that CATV's undirected growth constituted a threat to the orderly development of television service, it was the Commission's duty, in the public interest, to assert the regulatory jurisdiction exercised here. *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475–476; *Carroll Broadcasting Co.* v. *Federal Communications Commission,* 258 F. 2d 440, 443 (C.A.D.C.).

It was not necessary for the Commission to find specific mention of CATV in the Act. *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 218. Nor was it required to catalog CATV as broadcasting (see *CATV and TV Repeater Services,* 26 F.C.C. 403, 431) or CATV systems as common carriers (cf. *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission,* 359 F. 2d 282 (C.A.D.C.)), in order to exercise its regulatory powers. The comprehensive grants of rulemaking authority are not merely housekeeping provisions. They constitute affirmative grants of power to achieve the purposes of the Act, derived from a reading of the Act as a whole "and with appreciation of the responsibilities of the body charged with its fair and efficient operation." *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203. Such powers are co-terminous with the scope of agency regulation. *American Trucking Ass'ns* v. *United States,* 344 U.S. 298, 309–311.

Moreover, the Commission's assertion of regulatory jurisdiction over CATV, insofar as it affects television broadcasting, is essentially but a particularization of the Act's public interest standards. When another such particularization—the Commission's Chain

Broadcasting regulations—was challenged as going beyond the Commission's powers, this Court held, in rejecting the attack (*National Broadcasting Co.* v. *United States,* 319 U.S. at 219–220):

> * * * While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

Such considerations have been applied in many other contexts. *American Trucking Ass'ns, supra,* involved rules adopted by the Interstate Commerce Commission governing the use by motor carriers of leased and interchanged equipment which was otherwise exempt from Commission regulation. Although leasing practices were not specifically committed by statute to the agency's jurisdiction, the Court sustained the rules under the Commission's general power to

enforce the Act's provisions, recognizing that the specific powers would be meaningless without authority to prevent frustration of the Act's purposes (344 U.S. at 311). A similar approach has been taken in a number of other regulatory contexts.[28] For example, in *Pan American World Airways* v. *United States*, 371 U.S. 296, this Court upheld the authority of the Civil Aeronautics Board to order divestiture even though that power was not expressly set forth in the statute. Observing that "Congress must have intended to give it authority that was ample to deal with the evil at hand," the Court analogized the power of agencies to mold administrative decrees with those of courts to frame injunctive decrees "subject of course to judicial review" (371 U.S. at 312).

All of this was plainly recognized by the District of Columbia Circuit in *Buckeye Cablevision, Inc.* v. *Federal Communications Commission, supra,* which squarely conflicts with the decision below.[29] In *Buckeye,* the Commission issued a cease-and-desist order to compel a CATV system in Toledo, Ohio, to obey the distant-signal rules. On petition for review, the court of appeals held that the Commission has ample power to issue and enforce such rules, and that in

[28] *E.g.*, *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 379 F. 2d 153, 158 (C.A.D.C.) (Section 309 of the Federal Power Act, 16 U.S.C. 825(h)); *American Airlines* v. *Civil Aeronautics Board*, 359 F. 2d 624, 627–628 (*en banc*) (C.A.D.C.), *certiorari denied*, 385 U.S. 843 (Section 204 of the Federal Aviation Act, 49 U.S.C. 1354(a)); *Public Service Commission of New York* v. *Federal Power Commission*, 327 F. 2d 893, 896–897 (C.A.D.C.) (Section 16 of the Natural Gas Act, 15 U.S.C. 717*o*.)

[29] See Pet. App. D, where the *Buckeye* opinion is reproduced.

doing so it had "chosen an eminently reasonable course. The growth of CATV is so rapid that, if it is allowed to proceed unabated, harm to the regulatory scheme can occur before the FCC can act" (Pet. App. D 72).[30]

Conversely, the restrictive approach adopted by the court below—that the Commission's rulemaking powers under Sections 4(i) and 303(r) are limited to broadcast licensees—would defeat the comprehensive purposes of the Act to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)), and "to secure the maximum benefits of radio to all the people of the United States. * * *." *National Broadcasting Co.* v. *United States*, 319 U.S. at 217. As *Buckeye* makes clear, the Commission's powers are not "rigidly compartmentalized into 'licensing' and 'public utility regulation' functions" (Pet. App. D 73, n. 19). See *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951. Those powers extend, and must necessarily extend, if the Commission is to regulate effectively, to all conduct by persons subject to the Act which, as in the case of CATV, directly relates to and affects broadcasting.[31]

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[30] Only the D.C. Circuit, in *Buckeye*, and the Ninth Circuit, in the instant case, have reached and decided the question of Commission authority to regulate CATV systems. A number of similar cases are pending in various courts of appeals (see Pet. App. G 93–95), and it seems apparent that these courts are disposed to await a decision by this Court in the instant case on the jurisdictional issue.

[31] Nor are the Commission's statutory powers to regulate CATV in any way affected by supposed past disclaimers by

Regents v. *Carroll*, 338 U.S. 586, does not support the restrictive reading of the Act adopted by the court below. In that case a station's license had been renewed on condition that it repudiate a certain contract. That contract provided for the payment of money and had been entered into in lieu of another contract found by the Commission to have effected an improper delegation of control. The station was ordered by a State court to make a payment under the contract. Upon review this Court held that the station's defense of impossibility, based on the condition in its license, was a matter of State law. In the course of its opinion the Court noted that the Commission's remedial powers under the Act as it then stood were centered on its licensing functions. But the *Regents* holding does not in any event "bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory

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the Commission of authority over non-microwave CATV (see *supra*, p. 9) or by its efforts to obtain legislation on the subject from Congress. Not only does the Second Report and Order show that there was no settled administrative construction supporting CATV exemption from Commission control (A. 8–9); even had there been, the Commission, "faced with new developments * * *, may alter its past interpretation and overturn past administrative rulings and practice." *American Trucking Ass'ns* v. *Atchison, T., & S.F. R. Co.*, 387 U.S. 397, 416. And the Commission can hardly be chastised for requesting "congressional guidance as to policy and congressional clarification of [its] authority" in the CATV field (A. 63), or for having done so in the past (see A. 3, 10). If congressional inaction indicates anything, it seems to suggest that Congress is content to allow the Commission to proceed to regulate CATV under its promulgated rules and pursuant to its existing statutory authority.

scheme." *Buckeye Cablevision, Inc.* v. *Federal Communications Commission* (Pet. App. D 73).[32]

It seems plain, therefore, that the statutory powers given the Commission are ample to authorize its regulation of the carriage of television signals by CATV systems. Indeed, that is the only aspect of CATV operations over which Commission authority has been asserted. No attempt has been made to franchise or otherwise regulate entry into the CATV business, nor to fix CATV rates or limit the number of systems which can operate in a particular area. Nor was the Commission's purpose in any sense to undermine the development of CATV. Rather, the Commission noted at several points in the Second Report and Order the beneficial nature of various aspects of CATV service (*e.g.*, A. 21–22, 57), and stressed that "the rules [which it adopted] do not halt CATV service or growth" (A. 62). It was the Commission's purpose to assert jurisdiction over CATV systems, at a time when that assertion could be effective, to give it an opportunity to study the difficult questions of CATV's potential impact on local stations and on television broadcasting

[32] Nor does *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, support the decision below. That case sustained the Commission's authority to interpret 18 U.S.C. 1304, prohibiting the broadcast of lotteries, and to deny a license on that ground, but found that the Commission's definition of a lottery was in part erroneous. This Court's statement that the Commission (p. 289) "would be remiss in its duties if it failed, in the exercise of its licensing authority, to aid in implementing the statute [Section 1304]," is hardly an indication that the licensing authority over broadcasters is the sum total of the authority over interstate transmissions granted by the Act.

generally. As the Commission pointed out, "[W]e have specified no 'freeze' but rather a full exploration of the facts of each case, so that we may make an informed judgment on this most important question. We believe that this is a reasonable way to proceed, and that the public interest requires no less a procedure" (A. 63; see also A. 4). In short, the Commission simply determined that it had the duty to investigate fully the significance of CATV and determine what mode of regulation, if any, this new development in communications should be subjected to in the future.

Yet, it cannot seriously be questioned, in the light of the Commission's findings, that the problems posed by CATV growth are serious, and that they involve a genuine threat of potential harm to the public interest and possible frustration of congressional goals. Accordingly, the Commission properly concluded that its statutory authority extended to non-microwave CATV and that it should exercise that jurisdiction presently. CATV no doubt can play a vital role in supplementing broadcast service and in bringing television to those areas which might not otherwise enjoy it. In view, however, of the rapid development and possible impact of CATV, the public interest requires that conditions conducive to a sound future "be assured rather than left uncertain." *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241. In assuming jurisdiction to regulate CATV, the Commission acted in a proper and timely fashion, and its action is grounded on a solid statutory foundation. Thus, the Ninth Circuit erred in concluding that the Commission's rulemaking authority extended only to

licensees,[33] and therefore did not include non-microwave CATV.[34]

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[33] It might be argued that the Commission's rules in effect constitute licensing of CATV systems. The Administrative Procedure Act defines a license as "an agency permit, certificate, approval * * * or other form of permission" (5 U.S.C. (Supp. II) 551(8)). But the CATV rules do not purport to establish a licensing structure analogous in any sense to that which applies to radio stations pursuant to Title III of the Communications Act. No attempt is made to pass on the qualifications of prospective CATV operators or to assess the adequacy of their proposals in any legal, financial or technical sense. Cf. 47 U.S.C. 308, 309. The Commission's only objective was to assure that the service provided by CATV systems will be consistent with the establishment and healthy maintenance of television broadcast service in the area, a matter clearly committed to Commission concern under the terms of the Communications Act. If, as we have urged, the Commission may regulate the activities of those engaged in interstate communication by wire to the extent necessary to achieve this goal, it makes no difference whether its actions are termed "licensing" or something else.

[34] Any doubt that the Ninth Circuit viewed its decision in the instant case as having reached and resolved the question of Commission jurisdiction over CATV is dissipated by that court's holding in *Valley Vision, Inc.* v. *United States*, C.A. 9, Nos. 21869 and 21870 (order of June 29, 1967). There the court of appeals cited the instant case as sole authority in staying a cease-and-desist order of the Commission against violation of the CATV rules. Since no interim stay order was there involved and the Commission has express authority to issue cease-and-desist orders for violations of its rules (47 U.S.C. 312(b)), it is clear that the Ninth Circuit views the Commission as having no jurisdiction over non-microwave CATV.

II. THE COMMISSION ACTED WITHIN ITS STATUTORY AUTHORITY IN DIRECTING RESPONDENTS TO LIMIT EXPANSION OF THEIR OPERATIONS PENDING ITS CONSIDERATION OF THE IMPACT OF SUCH AN EXPANSION ON LOCAL BROADCASTING

If the Commission has jurisdiction to regulate CATV systems, it seems plain that that authority must encompass all that is necessary to prevent frustration of the Act's purposes. *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 311. Power to maintain the status quo during an interim period while the Commission investigates the impact of CATV in particular markets is not merely useful; it is indispensable to effective performance of the Commission's statutory responsibilities. As it pointed out in this case (A. 166): "Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act."

Sections 4(i) and 303(r) contain sweeping grants of authority for the Commission to "make such rules and regulations, and issue such orders" not inconsistent with the Act as it may find necessary in the execution of its functions, and to "make such rules and regulations and prescribe such restrictions and conditions" not inconsistent with the Act "as may be necessary to carry out [its] provisions * * *" (47 U.S.C. 154(i), 303(r)). That such statutory language cannot be read in a niggardly fashion seems clear from prior precedents involving the agency here involved, and from decisions relating to other agencies to which Congress has similarly given an extensive grant of regulatory author-

ity. In *Niagara Mohawk Power Corp.* v. *Federal Power Commission,* 379 F. 2d 153, for example, the D.C. Circuit recently pointed out that "there is no dearth of decisions making clear that [such provisions] are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act" (*id.* at 158).

CATV presents novel problems; neither the Commission nor the industry has yet been able to assess fully the impact which this new development may have on broadcasting. The thrust of the Commission's rules, therefore, is not to prevent the development of CATV but to permit the examination, on an *ad hoc* basis, of its effect on particular markets and on the Commission's allocation of television service throughout the country.[35] It seems plain that " * * * this kind of flexibility and adaptability to changing needs and patterns * * * is an essential part of the office of

[35] In point of fact, the Commission's determination to suspend CATV expansion in the major markets pending hearings and case-by-case determinations is consonant with the congressional policy, as reflected in the Communications Act, of having the agency decide "important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop" (A. 58). Section 319 of the Act (47 U.S.C. 319) is a specific example of that congressional policy, in that it prohibits issuance of a station license unless a construction permit is first secured. Similarly, Sections 301 and 309 of the Act require Commission decision of public interest questions before the broadcasting stations can begin operations (47 U.S.C. 301, 309).

a regulatory agency." *American Trucking Ass'ns v. Atchison, T., & S.F.R. Co.*, 387 U.S. 397, 416.[36] But such an examination could be completely frustrated if CATV systems were to mushroom in the very markets under study while the Commission was proceeding to ascertain the facts and make informed determinations. Unless the status quo is maintained in the interim, the Commission's investigation may be mooted by a *fait accompli*.[37] As the Commission stated (A. 58):

> It is important, we think, to exercise [our] jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consistent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of disruption which would result, to take effective action or to attempt to roll back the situation, if it should

[36] Similarly, in *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 359 F. 2d 282 (C.A.D.C.), where the court of appeals upheld as rational and permissible the Commission's determination to regulate CATV systems as adjuncts to the country's broadcasting system rather than as common carriers, it was stated that "the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry" (*id.* at 284).

[37] If the Commission lacks power to maintain the status quo in aid of its jurisdiction over CATV pending a hearing, its only recourse, should it eventually determine that expansion should not, in the public interest, be permitted, would be the quite undesirable and rather infeasible one of requiring removal of already installed systems.

develop or be shown that the CATV operation is inconsistent with the public interest.

The same considerations apply whether the status quo is to be maintained by a general rule (as in Section 74.1107) restricting new franchises in the top 100 markets pending a hearing, or by *ad hoc* rulings tailored under Section 74.1109 to the facts of the particular situation, as in the instant case.

This is precisely the kind of circumstance in which the Commission may proceed either by a general rule or by a particular order.[38] *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202; cf. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205; *Meredith Broadcasting Co.* v. *United States*, 365 F. 2d 912 (C.A.D.C.); *Law Motor Freight Inc.* v. *Civil Aeronautics Board*, 364 F. 2d 139 (C.A. 1).[39]

[38] See Administrative Procedure Act, 5 U.S.C. (Supp. II) 551; 1 Davis, Administrative Law Treatise, Secs. 5.01, 5.05.

[39] In *Storer*, the Commission adopted multiple ownership rules which limited the number of stations an applicant might own, and dismissed without hearing an application which would have exceeded the limit. The applicant argued that he could not thus be denied the hearing provided by 47 U.S.C. 309; this Court held, however, that under the general rulemaking power conferred in 47 U.S.C. 154(i) and 303(r), the application was properly denied. The applicant's right to a hearing was adequately preserved by the opportunity provided in the rules to apply for a change or waiver upon a sufficient showing (351 U.S. at 202–206).

In *Meredith*, the Commission adopted an interim policy of not passing on applications for stations in the top 50 markets by multiple-station owners above a certain limit, while it considered proposed changes in the multiple ownership rules; its action in this regard was sustained by the court of appeals.

In *Law Motor Freight*, the court held that an order of the Civil Aeronautics Board exempting an air freight forwarder's pickup and delivery service in a particular zone from regula-

Under the Administrative Procedure Act, results reached by the agencies in the foregoing cases could have been accomplished by rulemaking or by adjudication. By the rules prescribed with respect to CATV, the Commission, so far as it found it feasible, adopted an interim stay policy with regard to expansion of systems in the top 100 television markets. For grandfathered systems like those of respondents, however, the Commission refrained from adopting any general prohibition on expansion, but instead determined to ascertain whether an interim stay would be appropriate only after consideration of the particular facts.

There can hardly be any complaint because here the status quo is maintained, not automatically, by operation of law; but rather by special order, entered after notice and upon consideration of the particular circumstances. Stated differently, in the kind of situation here involved the Commission has determined to proceed on an *ad hoc* basis rather than to prescribe by general rule a suspension of system expansion pending a hearing in each and every case. That it could have done so, assuming jurisdiction over CATV generally, seems clear from a consideration of the same statutory sources which suport its general rulemaking powers. That it chose rather to adopt a more flexible procedure, and place the burden on interested persons who fear adverse effects from expansion of existing systems to seek the initiation of an inquiry, seems an eminently reasonable course for the Commission to

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tion under the Federal Aviation Act was rulemaking despite its particularized nature.

follow with respect to the kind of situation presented here—the overlapping of Grade B contours.

After consideration of the pleadings and affidavits of the parties, the Commission concluded that this was a classic case for an evidentiary hearing on the public interest questions posed by the expansion of respondents' systems throughout the San Diego area, and a case falling squarely within the policy of the Second Report and Order (A. 161–162). It was undisputed, the Commission found (A. 162), that there was considerable UHF activity underway in San Diego, that respondents' systems had commenced operations only recently, and that while these systems then had relatively few subscribers, they had the potential to expand throughout San Diego County under franchises covering areas where approximately 90 percent of all the homes within the Grade A contour of the San Diego stations are located.

In further concluding that interim relief appropriately limiting further expansion pending a hearing was necessary, the Commission stated (A. 163):

> Further, unless this expansion is appropriately limited pending resolution of the issues within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief appropriately limiting further expansion until

resolution of the public interests issues is called for.

An interim stay of this kind is not analogous to a cease-and-desist order, and maintenance of the status quo is not imposed as a sanction for violation of the statute or the Commission's rules. Thus, Section 312 of the Act (47 U.S.C. 312), which provides for permanent cease-and-desist orders for violation of the Communications Act or the Commission's rules, is not germane. The court below inferred from the existance of Section 312 that the Commission lacked power to enter an interim order of the kind involved here. Section 312, however, authorizes a sanction for past violations and issues only after a full evidentiary hearing. That critical distinction wholly undermines the reliance of the court below on the Commission's power to issue cease-and-desist orders as a ground for concluding that the Commission lacks the authority to issue interim orders addressed to such a discrete problem. Indeed, a cease-and-desist order would be of little assistance in stabilizing a rapidly changing situation while the Commission has an opportunity to study the matter.

Nor is the question of the agency's power to issue what would amount to a temporary cease-and-desist order, pending adjudication of an alleged violation, presented here. Decisions such as *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Board,* 302 F. 2d 875 (C.A.D.C.), and *Standard Airlines, Inc.* v. *Civil Aeronautics Board,* 177 F. 2d 18 (C.A.D.C.), are thus inapplicable. Those cases involved an attempt by an administrative agency, without express or implied statutory authority, to suspend ongoing activities while an adjudication of an alleged

violation of law was made. See Jaffe, *Judicial Control of Administrative Action*, 662 (1965). And in both cases the agency action in effect rescinded operating authority which had previously been granted by the agency. No such situation exists here. CATV systems were not in any sense given operating authority by the Commission. Moreover, the interim order stayed only further extension of the existing systems, and did not require cessation of any service already being provided by respondents.

If an agency lacks the statutory authority to prescribe an interim stay pending an evidentiary hearing, the agency's only recourse is to apply to a court of appeals for an injunction under the All Writs Act which will preserve the court's jurisdiction to enter an effective order after hearing. *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. But the Communications Act, unlike the more narrowly drawn Federal Trade Commission Act involved in *Dean Foods*, itself confers on the Commission authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions" (47 U.S.C. 154(i), 303(f), 303(r)).[40]

A court may apply familiar standards for preliminary relief[41] when asked for an injunction pending a

[40] Moreover, as the Commission observed in this case, an application under *Dean Foods* "would not permit the initial consideration of the matter by the Commission, followed by judicial review, which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission" (A. 166, 177). Not, unlike the Commission, is the FTC the sole body charged by Congress with the administration of the laws in question.

[41] See *Virginia Petroleum Jobbers* v. *Federal Power Commission*, 259 F. 2d 921 (C.A.D.C.).

hearing which will adjudicate a violation of established law or regulations. However, when the agency is not considering a violation, but is attempting to establish, in an evidentiary proceeding, a rule for the conduct of regulated activity in a particular market, the issues are singularly inappropriate for initial judicial consideration. The agency itself must assess the need for maintaining the status quo. Its powers to do so derive from the same statutory sources that enable it to adopt the final rule.

An illustration of the principle is *Amerada Petroleum Corp.* v. *Federal Power Commission,* 293 F. 2d 572 (C.A. 10). There, under provisions similar to the Communication Act's broad grants of regulatory authority, the court sustained the jurisdiction of the Federal Power Commission to bar rate changes to be made effective during the period when prior changes relating to the same service were suspended. Although the Act contained no other restriction against such changes, power to maintain the status quo was inferred from the entire regulatory scheme.

Even where violations are charged, interim relief has been permitted. In *R. A. Holman & Co., Inc.,* v. *Securities and Exchange Commission,* 299 F. 2d 127 (C.A.D.C.), certiorari denied, 370 U.S. 911, interim action by the Commission in suspending a broker's right to deal in exempt securities pending a hearing was sustained under that agency's general regulatory powers. The court noted (299 F. 2d at 131):

> In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest in-

> fringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing. * * *

Of course, as *Holman* indicates, the validity of an interim order depends upon a reasonable balancing of public and private interests. Here the Commission found temporary relief to be necessary to prevent consequences potentially adverse to the public resulting from the unfettered growth of respondents' systems while a hearing was in process. It weighed the effect on respondents of halting their expanded importation of Los Angeles signals against the possible adverse effects continued expansion might have on the San Diego market. Respondents were left free to extend their lines and to enroll new subscribers, subject only to a limitation on their right to import Los Angeles signals into new geographical areas in San Diego. And the Commission's order specifically provided that "if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration" (A. 179).[42]

Assuming Commission jurisdiction over CATV generally, an inability to issue interim stay orders would

[42] On November 14, 1967, the Commision rejected a request by Southwestern to terminate the interim order as to it (11 Pike & Fischer R.R. 2d 721). The Commission found that the request was based largely upon findings of the hearing examiner which were still subject to Commission review, and that Southwestern's financial position seemed to be improving since the date of the original interim stay order.

in effect restrict the Commission to acting only by general rules, the result of which would be to freeze CATV development across the nation. Had the Commission so proceeded, it could have provided, on an *ad hoc* basis, waivers of the application of such general rules to particular CATV systems,[43] such as those of respondents. In an effort to approach the matter in a flexible, commonsense way, the Commission chose instead to limit the scope of the general rules to certain, well-defined situations where the potential impact of CATV was likely to be significant and where no grandfather rights existed. Thus, rather than impose a general stay by rule, to which CATV systems must seek exception, it has left CATV systems such as those of respondents free to expand, subject only to complaints by parties allegedly injured and a finding of the need for a particularized stay in the particular market. Such flexibility in the choice of remedies is of the very essence of the regulatory authority Congress conferred on the Commission. "The Communications Act must be read as a whole and with an appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions." *United States* v. *Storer*

[43] As of November 30, 1967, approximately 320 pleadings have been filed under the Commission's distant-signal rules (Section 74.1107), requesting hearings or waivers, 204 of which are still pending. Under the Commission's "additional or different requirements rule" (Section 74.1109), approximately 553 proceedings have been filed, 271 of which remain pending.

Broadcasting Co., 351 U.S. at 203. Here, we submit, the Commission's actions were authorized by and fully comply with the provisions of the Communications Act.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

FRANCIS X. BEYTAGH, JR.,
Assistant to the Solicitor General.

HOWARD E. SHAPIRO,
Attorney.

HENRY GELLER,
General Counsel,

DANIEL R. OHLBAUM,
Deputy General Counsel,
Federal Communications Commission.

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APPENDIX

COMMUNICATIONS ACT OF 1934

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or

transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

* * * * *

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * *

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

* * * * *

SEC. 4. (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

* * * * *

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or posession of the United States or in the District of Columbia to another place in the same territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United

States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

* * * * *

(h) Have authority to establish areas or zones to be served by any station;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately re-

ceiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

* * * * *

SEC. 307. (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * *

SEC. 312. (b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

SECTIONS 74.1103–74.1109 OF THE COMMISSION'S RULES (47 C.F.R. 74.1103–74.1109, AS AMENDED)

§ 74.1103 REQUIREMENT RELATING TO DITRIBUTION OF TELEVISION SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS

No community antenna television system shall supply to its subscribers signals broadcast by one or more

television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially dupli-

cate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority, if the satellite station and its parent station are of equal priority, the system may select between them.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirma-

tively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon

as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programing in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

§ 74.1105 NOTIFICATION PRIOR TO THE COMMENCEMENT OF NEW SERVICE

(a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station car-

ried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communciations Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any.

(b) The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence.

(c) Where a petition with respect to the proposed

service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided, however,* That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107.

(d) The provisions of this section do not apply to any signals which were being supplied to subscribers in the community of the CATV system on March 17, 1966, unless it is proposed to extend lines into another community.

NOTE 1: As used in § 74.1105, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

NOTE 2: As used in § 74.1105, the term "television broadcast station" includes foreign television broadcast stations.

§ 74.1107 REQUIREMENT FOR SHOWING IN EVIDENTIARY HEARING AND COMMISSION APPROVAL IN TOP 100 TELEVISION MARKETS; OTHER PROCEDURES

(a) No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy

maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, the date on which copies of the notifications required by § 74.1105 of this chapter were filed with the Commission, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such a response or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a

petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers in a community on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: *Provided, however,* That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area or any extension into another community does come within the provisions of paragraphs (a) and (b) of this section: *And provided further,* That no CATV system located in a community in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend such service to new geographical areas within the same community where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66–220, paragraphs 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas in the community. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service

to new geographical areas in violation of the terms of the specified temporary relief.

(e) Within 60 days of issuance of a request filed pursuant to paragraph (a) of this section, interested parties seeking simultaneous consideration with such request must file appropriate requests for any other CATV system in the same television market. All requests for CATV systems in a given market timely filed with respect to the first request will be processed and considered simultaneously. Later filed requests for the particular market will be subject to chronological processing and may not be considered in the same proceeding as the earlier requests.

NOTE 1: As used in § 74.1107, the term "television broadcast station" includes foreign television broadcast stations.

§ 74.1109 PROCEDURES APPLICABLE TO PETITIONS FOR WAIVER OF THE RULES, ADDITIONAL OR DIFFERENT REQUIREMENTS AND RULINGS ON COMPLAINTS OR DISPUTES

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state

fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify

other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

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No. 428

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OCTOBER TERM, 1967

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

Of Counsel:

COVINGTON & BURLING
701 Union Trust Building
Washington, D. C. 20005

MILLER & SCHROEDER
1329 E Street, N.W.
Washington, D. C. 20004

ERNEST W. JENNES
CHARLES A. MILLER
701 Union Trust Building
Washington, D. C. 20005

Attorneys for Petitioners

December, 1967

Washington, D. C. THIEL PRESS 202 393-0625

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Supreme Court of the United States

OCTOBER TERM, 1967

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (A. 184) is reported at 378 F.2d 118. The memorandum opinion and order of the Federal Communications Commission (A. 146) is reported at 4 F.C.C.2d 612.[1]

[1] The original memorandum opinion and order inadvertently omitted a number of lines supplied the following day by an erratum (A. 176). In the memorandum opinion and order reprinted in the sep-

JURISDICTION

The judgment of Court of Appeals was entered on April 28, 1967 (A. 194). The petition for writ of certiorari was filed on July 27, 1967, and granted on October 23, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1964) and 28 U.S.C.A. § 2350 (1966 Supp.).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has authority under the Communications Act of 1934 to adopt rules regulating directly certain aspects of the operations of community antenna television (CATV) systems.

2. Whether such authority encompasses procedures designed to preserve the status quo pending the Commission's evidentiary hearing to determine whether the importation by CATV systems of television station signals from one area into another would jeopardize local television broadcast service and hence be contrary to the public interest.

STATUTES AND RULES INVOLVED

Sections 1, 2(a), 3(b), 3(e), 4(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b) and 312(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S. §§ 151, 152(a), 153(b), 153(e), 154(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), 312(b) (1964), and sections 74.1103, 74.1105, 74.1107 and 74.1109 of the Rules of the Federal Communications Commission, 47 C.F.R. §§ 74.1103, 74.1105, 74.1107, 74.1109 (1967), are set forth in the appendix of the Brief for the United States and the Federal Communications Commission in No. 363, companion to the present case.

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arate appendix, these lines (nos. 10-21 at A. 167) have been inserted for convenient reading. All citations designated "A." refer to the decisions and orders of the Court of Appeals and the Commission reprinted in the separate appendix filed in this Court.

STATEMENT

This case deals with the authority of the Federal Communications Commission to regulate the transmission of the signals of television stations by community antenna television systems to prevent frustration of national policies intended to maximize the availability of free off-the-air local television broadcast service for all Americans.

A. *Television and CATV*

The Communications Act of 1934, 47 U.S.C. §§ 151-609 (1964), which establishes the basic structure of American television, seeks to provide "all the people of the United States a rapid, efficient, Nation-wide . . . wire and radio communication service" and to furnish each of the several states and communities with a "fair, efficient, and equitable distribution" of service. Sections 1, 307(b), 47 U.S.C. §§ 151, 307(b) (1964). To further these purposes it directs the Federal Communications Commission to distribute "licenses, frequencies, hours of operation, and of power" and authorizes it to establish "areas or zones to be served by any station." Sections 303(h), 307(b), 47 U.S.C. §§ 303(h), 307(b) (1964).

In performing these statutory responsibilities the Commission has sought to develop a national television structure based upon a large number of local broadcasting stations throughout the country rather than a handful of superstations in huge metropolitan centers. This structure is principally designed (1) to give at least some off-the-air service to as many Americans as possible, (2) to maximize the number of communities with local or area outlets of self-expression and (3) to provide multiple program choices off the air for the largest possible number of people—all without regard to ability to pay.[2] See Sixth Report and Order, 1

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[2] Local television stations present programs addressed to local and area concerns and programming of regional or national interest. National programming is obtained through one of the major commercial

P & F Radio Reg. 91:601, 17 Fed. Reg. 3905 (1952). Basic to this structure is a "table of assignments" of television channels, first adopted by the Commission in 1952 and since then continually revised, 47 C.F.R. § 73.606(b) (1967), which allots available channels to communities throughout the United States and designates them for use by commercial or noncommercial educational stations.[3] Also basic to this scheme are Commission rules governing station tower height and power which effectively limit the general area to be served by each station, 47 C.F.R. §§ 73.614, 73.689 (1967), thereby creating a pattern of existing and potential stations shaped to attain statutory ends.

In addition to these technical standards and requirements, the Commission has adopted rules to foster diversity and prevent concentration of control of television broadcast stations and to limit sharply the use of multiple transmitting facilities for extending the reach of a station. These regulations include the Commission's multiple ownership rules and rules limiting concentration of ownership in neighboring markets which have long controlled the number and location of television stations which any single entity may own or control and the extent to which the signals of its stations may be extended. 47 C.F.R. § 73.636 (1967). Also restricting the extension of the signals of particular stations are the rules and policies limiting operations of auxiliary television transmitting stations. *Id.* and 47 C.F.R. §§ 74.731-32, 74.831-32 (1967).

This national television structure is bottomed on the use of both the 12 very high frequency (VHF) channels and the 70 ultra high frequency (UHF) channels available for tele-

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or educational television networks (if the local station is network affiliated) and by all stations from other kinds of national suppliers.

[3]The Commission's table of assignments has been sustained by the courts. Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954); Peoples Broadcasting Corp. v. United States, 209 F.2d 286 (D.C. Cir. 1953).

vision broadcasting. No significant increase in the number of television stations, especially to provide additional choice of service in areas that already have television stations, is possible on the 12 VHF channels without causing intolerable interference to television reception. Accordingly, expanded use of UHF channels is imperative for a full pattern of free off-the-air television service provided by local and area television broadcast stations. UHF channels are also vital to foster noncommercial educational television development since most channels reserved for such use are UHF. 47 C.F.R. § 73.606(b) (1967). However, until recently most of the UHF assignments have remained unused,[4] primarily because the great bulk of television sets were not equipped to receive UHF broadcasts.[5]

To meet the threshold obstacle to UHF development the Congress in 1962 enacted the all-channel receiver law, pursuant to which all television receivers purchased after April 30, 1964, must be equipped to receive UHF as well as VHF broadcasts.[6] That statute reflects not only the Congress' concern that the policies of the Communications Act of maxi-

[4] As late as December 1964, 82 percent of allocated commercial VHF channels were activated and only 7 percent of the commercial UHF complement. Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry 10 (Report to the FCC 1965). See Note, 75 Harv. L. Rev. 1578 (1962).

[5] By 1962, only 9 million or 16 percent of the 55 million sets owned by the public could receive UHF. H.R. Rep. No. 1559, 87th Cong., 2d Sess. 2 (1962). The result was a "vicious circle": "Unless the public has sets that can receive UHF as well as VHF, prospective UHF stations will not be able to reach the audiences necessary for effective operation and UHF stations will be deterred from coming into being. Yet, without UHF stations in operation, the public lacks the incentive to buy sets capable of receiving both UHF and VHF." *Id.* at 5.

[6] 76 Stat. 150, adding 47 U.S.C. §§ 303(s), 330 (1964). See H.R. Rep. No. 1559, 87th Cong., 2d Sess. 2-6 (1962); S. Rep. No. 1526, 87th Cong., 2d Sess. 2-5 (1962).

mum development of local broadcast outlets were not being implemented but also its recognition that those policies could be accomplished only through full use of UHF as well as VHF. The Congress realized that expansion of UHF television would not take place overnight. Indeed, its interest was in the long-range development of a full pattern of nationwide television broadcast service. Thus, it sought to provide the foundation for local broadcasting through an ever increasing audience of viewers to make it possible for new UHF stations to come on the air and to sustain their healthy operations.[7] The initial success of this effort is reflected in the growing number of UHF stations, both commercial and noncommercial, which has nearly doubled in the period since the statute and increased by three dozen stations in the past year alone.[8]

The evolving structure of local television broadcasting has been increasingly threatened by a new form of CATV, whose very purpose is to extend the range of television signals beyond the bounds fixed by the Commission. CATV systems operate by collecting, usually through a master antenna located at high elevation, television signals directly from originating stations or via microwave radio relays, that distance or other natural conditions would prevent television sets from receiving adequately or at all in the CATV-served com-

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[7]Public Broadcasting Act of 1967, P.L. 90-129, and Educational Television Facilities Act of 1962, 76 Stat. 64, in aid of noncommercial television further affirmed the Congress' reliance on local television. See H.R. Rep. No. 999, 87th Cong., 1st Sess. 13 (1961); H.R. Rep. No. 572, 90th Cong., 1st Sess. 18 (1967); S. Rep. No. 222, 90th Cong., 1st Sess. 7 (1967).

[8]TV Digest, Television Factbook No. 37, at 52-a (1967) reports that as of January 1 of each year the number of UHF stations on the air was 91 in 1961 and 174 in 1967. As of December 1967, 210 UHF stations were operating, 209 new UHF permittees had been authorized and 96 applications for additional UHF stations were pending. TV Digest, Weekly TV Addenda to Television Factbook No. 37, Dec. 11, 1967, p. 1.

munity. The signal is then amplified and transmitted to and throughout the community by means of coaxial cable and further amplified and carried into each individual home through a wire hooked directly into the television set. See 47 C.F.R. § 74.1101(a) (1967). For this service provided by "complex, extensive and expensive instrumentation," p. 24 *infra*, the subscriber is charged a continuing monthly payment and normally an installation fee.

During CATV's early period, practically all systems confined themselves to the supplementary function of providing television service, usually up to three to five channels, to small and isolated communities with little or no off-the-air service. Corry, Community Antenna Television: An Economic Survey 2-3 (Cong. Leg. Ref. Serv. 1965). In recent years the focus of CATV has begun to change radically. When the Commission asserted the regulatory authority challenged below, CATV was increasingly attempting to move into places with multiple local television service, and where new UHF stations had recently begun service or could be expected to do so in the reasonably near future (A. 15, 48). Moreover, they were seeking to import signals from centers like Los Angeles, New York and Chicago not normally received off the air (A. 48). Signals were being transported increasing distances (A. 48). Twelve channels were becoming commonplace among new systems and systems of twenty channels and more were under development (A. 47).

By the end of 1965, shortly before the Commission acted to regulate CATV directly, over 1500 CATV systems (mostly of a traditional nature) were already in operation but in addition nearly 3000 local CATV franchises had been obtained or were being sought (A. 47). With its high rate of profit, the industry had started to attract multi-system operators and giant corporations.[9] Given CATV's ability

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[9]Corry, Community Antenna Television: An Economic Survey 9-13 (Cong. Leg. Ref. Serv. 1965); Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcast-

to penetrate the television markets in which most Americans reside, CATV's own estimates of its potential ranged so high as to predict CATV systems in "almost all American cities—small and large" and CATV linkages with "85 percent of all television sets in the United States" within the next decade (A. 49). And with FCC regulation imminent, CATV entrepreneurs were rushing to activate their systems in the hope of obtaining grandfather rights (A. 102-03), despite clear warnings from the FCC that "CATV operations may be subject to regulation." Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453, 472, 477 (1965).

B. *The CATV Rules*

Faced with the growing danger to basic regulatory policies, which unrestricted CATV would circumvent, and to the local station's economic structure, which unrestricted CATV would undermine, the Commission found itself compelled to assert rulemaking authority over CATV operations. In April 1965 the Commission first adopted rules with respect to CATV systems using radio microwave facilities. These rules required CATV systems to carry local stations and required nonduplication of their programs 15 days before and after broadcast. First Report and Order, 38 F.C.C. 683. At the same time, it issued a Notice of Inquiry and Notice of Proposed Rulemaking, stating its tentative decision to assert

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ing Industry 58-62 (Report to the FCC 1965). Among the companies engaged in CATV are General Electric, General Telephone and Electronics, Hughes Aircraft, RKO General and Time-Life. TV Digest, Television Factbook No. 37, at 568-a to 583-a (1967).

Indeed, respondent Trans-Video Corp., which owns or operates the other respondents, see n. 21 *infra*, was recently purchased by a subsidiary of Cox Broadcasting Corp. along with another small system for over seven million dollars. Broadcasting, March 13, 1967, p. 10. Cox owns and operates 20 CATV systems in 6 states, 5 large-city VHF television stations, and 4 AM radio stations, Moody's Industrial Manual, June, 1967, p. 566, and is tied to the company publishing the Atlanta Constitution and the Journal. TV Digest, Television Factbook No. 37, at 115-a (1967).

direct jurisdiction over CATV systems generally, to extend the carriage and nonduplication rules to nonmicrowave-served systems, and to adopt rules governing extension of signals from one television market into another television market. 1 F.C.C.2d 453.

Following the rulemaking proceeding and a deluge of comments from interested parties, the Commission in March 1966 issued its Second Report and Order (A. 1) explaining and adopting rules directly governing CATV transmission. The Commission concluded that unregulated expansion of CATV raised substantial problems of great significance to the public interest and that it could not "sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, 'Oh, well, so sorry that we didn't look into the matter'" (A. 52).

The Commission's concern was grounded on the economics of television broadcasting. Local television stations depend for income almost entirely upon advertising revenues, and an adequate level of advertising requires that the station develop and retain an adequate viewing audience. By bringing distant signals into a community (very often duplicating programs carried on the local stations), CATV systems splinter or fragment the local stations' audience and place existing local stations in jeopardy while discouraging the entry of new ones (A. 50).[10]

[10] A variant danger exists for noncommercial educational stations whose educational and cultural programming, buttressed by the new Corporation for Public Broadcasting, promises the development of one or more new public television networks of local stations throughout the country. While advertising revenues play no part in their budget, such stations depend importantly on financial support from local citizens, institutions and governmental bodies, support which can be lost when CATV imports distant educational channels. The distant station will not tie in so suitably to local needs and interests but as the stations have emphasized, people having paid once for commercial television as part of their CATV subscription are unlikely to pay a second time through contributions to the local educational station (A. 36-40).

Because CATV systems often remove their subscribers' receiving antenna when they are wired for CATV, the systems, if unregulated, have the added power to lock one or another local or area station out of subscribers' homes entirely by failing to carry it, or the CATV system may carry the local station but, for technical reasons, degrade its signal inducing the viewer to choose another channel. See First Report and Order, 38 F.C.C. 683, 702 (1965).

Lastly, by duplicating national or regional programs carried on local stations,[11] CATV destroys the costly exclusivity for which a local station has paid a national or regional program supplier in purchasing local rights (A. 54-55). In the case of national programs distributed by the major networks to their affiliates, such duplication may ultimately encourage the network to cancel as unnecessary the affiliation agreement which supplies the station much of its programming. As the Commission stated, "the CATV system presently stands outside of the . . . program distribution process" (A. 54). While the local station must bid for programs from suppliers and submit to bargained-for limitations on their use, CATV takes programs off the air at will and does so without payment to or permission from the program supplier, the copyright holder, the originating station, or the local station in the CATV community whose program is being duplicated (A. 54-55).[12]

The multiple impact of CATV seriously jeopardizes the financial ability of existing stations to operate in the public interest. At the extreme, a broadcaster may be driven off

[11] Program duplication is by and large on the same day and usually at the same time in the case of network programs. In the case of non-network programs duplication will normally be on different days. Indeed, the outside station may well carry a feature film or a series episode before the local station which has bargained for and obtained exclusive rights as against other local stations (A. 51).

[12] The question of copyright liability of CATV systems is pending before this Court in No. 618, Fortnightly Corp. v. United Artists TV, Inc., discussed pp. 33-35 *infra*.

the air completely if his share of the audience is sufficiently diminished. But even a moderate degree of pressure is likely to force the station to curtail its expensive and less profitable local programming—its unique contribution of local and area news, cultural programs and documentaries, state and city political reporting and similar community coverage.[13]

Of at least equal importance, CATV threatens to foreclose new stations from coming into existence by depriving them of both the audience and the exclusive programming vital to their development either at all or as effective local voices. New stations which do succeed in commencing operations may well find themselves unable to continue broadcasting or, at least, to provide the range of programming for which they are designed. These new stations, most of them destined for UHF channels, are the *sine qua non* of the national regime of free local television envisaged by the Commission.

For emerging UHF stations, hobbled by the limited number of sets initially able to receive them and by the lack of network affiliation in the numerous areas where the three major networks already have affiliates, unrestricted CATV operations could be fatal. The share of the total audience in a market available for independent stations is already small even without the added fragmentation of audience by importation of outside signals.[14] Under the best of circumstances UHF stations have a difficult time in the early

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[13] Nonlocal programming currently occupies about 84 percent of all commercial television station broadcast time, 85 percent of the time of network affiliates and 71 percent of the time of independent commercial stations. Television Magazine, August, 1967, p. 35.

[14] The Commission has found that the audience for all nonnetwork stations in most markets is limited to about 10 percent in prime time (A. 50). Respondents may contend, as was asserted during proceedings leading to the Second Report and Order, that CATV will help new UHF stations by bringing them into homes where they might not otherwise be received (A. 48). But as the Commission found, any gain in reception of UHF signals could be "far outweighed by the splintering of the limited audience for independent programing" (A. 50-51; see also A. 48 n. 54).

years.[15] Even in a city as large as Philadelphia the Commission recognized that the difficulties for UHF television could be great were no restrictions possible on CATV carriage of signals from New York (A. 48-50), and in smaller, even though important, markets even more serious problems are presented (A. 50 n. 57). Taking note of UHF's faltering past and improving prospects, the report declared that "we are at a watershed in the development of UHF broadcasting" (A. 46).

The Commission concluded that its statutory responsibilities did not permit it to stand idly by while CATV supplanted local broadcasting. As the Second Report and Order noted, the Commission's local broadcasting structure has been adopted by the Congress as national policy (A. 46-47), and CATV is thoroughly inadequate as a substitute. CATV systems cannot economically serve the sparsely settled areas, including rural areas, where the need for adequate off-the-air service is especially great for lack of other facilities. CATV also imposes a continuing cost that large numbers of poor citizens, increasingly an object of concern in our society, cannot afford without severe sacrifice, if at all. Finally, CATV does not serve as an outlet of local self-expression in the numerous ways that community-located stations do, and CATV will never be able to do so for those who are unable or unwilling to pay or who live in less dense outlying areas. See A. 51.

Accordingly, after reviewing and affirming its jurisdiction over CATV signal transmission, the Commission adopted "the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service" (A. 22). As a first step, the Commission modified and extended to all CATV systems the requirements earlier framed for microwave-served sys-

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[15] Of 94 UHF stations reporting profit and loss figures to the Commission for 1966, 39 percent reported losses and another 19 percent had profits of 50,000 dollars or less. FCC, TV Broadcast Financial Data—1966, at table 5 (1967).

tems. These included a carriage requirement based on a series of service priorities whose gist is to require local stations to be carried on the CATV system at their option without material degradation of signals. 47 C.F.R. §§ 1103(a), (b)(1967).[16] A related exclusivity requirement, also based on service priorities, provided that the system should not carry a program of one station duplicating a program available on a higher priority station on the same day.[17] 47 C.F.R. §§ 1103 (e)-(g) (1967).

Facing the larger question of limiting CATV importation of outside stations as such, the Commission acknowledged that "on the record before us, it is not possible to give a definitive answer to the future growth of CATV," particularly the extent of its penetration in major markets and its impact on UHF development in those markets (A. 49). As a corollary, it concluded that "we must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals" (A. 52).

The Commission therefore ruled that no new CATV system may carry into the Grade A contour of any local station in the 100 largest television markets the signal of any "distant" station (*i.e.*, one whose Grade B contour does not reach the community),[18] except upon a showing in an evi-

[16] As already pointed out, CATV systems have consistently declined to observe copyright requirements. Should a CATV system comply with copyright on a consistent basis, the Commission would not require it to carry any particular program as to which either it or the station requesting carriage could not obtain the necessary rights (A. 45, 116).

[17] This was a reduction of the earlier thirty day nonduplication period (A. 23-25, esp. ¶ 55; 117).

[18] The Grade A contour of a station delimits the area along whose outer perimeter good television reception may be expected 90 percent of the time at the best 70 percent of the locations. The Grade B contour is the line at which good reception may be expected 90 percent of the time at the best 50 percent of the locations.

dentiary hearing that such carriage is consistent with the public interest, and, specifically, the establishment and healthy maintenance of local television broadcast service.[19] 47 C.F.R. § 74.1107(a) (1967). The rules provided that the requirement could on request be waived by the Commission where appropriate. 47 C.F.R. § 74.1109(a) (1967).

Under a "grandfather" clause, outside signals being carried by existing CATV systems on February 15, 1966, may be continued but any geographic expansion by such systems is subject to limitation by the Commission where the public interest so requires. 47 C.F.R. § 74.1107(d) (1967).

In all other instances, the Commission's rules contemplated that it could decide on a case by case basis whether to hold hearings and grant relief against CATV transmission of outside signals. 47 C.F.R. §§ 74.1107(c), 74.1109(a) (1967). Importantly, these instances include (1) transmission into the area between the Grade A and Grade B contours of a station in the top 100 markets, (2) anywhere within the service area of a station in a market below the top 100, and (3) in "overlapping markets" situations, regardless of market size. Of this last instance, the Second Report and Order specifically noted that such individualized relief might be appropriate "if two major markets each fall within one another's Grade B contour (e.g., Washington and Baltimore)..." (A. 62 n. 69). As an example, it observed that the "carriage by a Baltimore CATV system of the signals of Washington... thus equalizing the quality of the more distant Washington signals . . . might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations" (A. 62 n. 69).

Finally, as a cornerstone of its CATV regime and indispensable to its effective operation, the Commission established procedures to halt the initiation or expansion of CATV service while ultimate limitations were being considered. New distant signals carried into the Grade A contour

[19] Although the Second Report and Order is largely concerned with the maintenance and development of UHF stations, the report and its rules relate to both UHF and VHF stations.

of major market stations were automatically forbidden until the Commission acted. 47 C.F.R. § 74.1107(a) (1967). In all other instances, including expansion of grandfathered systems, the rules provided for the Commission to determine whether temporary relief was called for in the public interest. 47 C.F.R. §§ 74.1107(d), 74.1109(f) (1967). A last loophole was closed by prohibiting CATV systems from commencing operations until after 30 days' notice and, if a petition respecting such service was filed within the period, until the Commission passed upon it or upon a request for temporary relief. 47 C.F.R. § 74.1105 (1967).

C. The Present Proceedings

Pursuant to the Commission's rules, petitioner Midwest Television, Inc., licensee of a television station in San Diego, California,[20] invoked the Commission's jurisdiction against respondents, four interrelated companies involved in CATV operations in San Diego.[21] Petitioners submitted affidavits and other materials to demonstrate the following: Respondents, each with grandfather rights under the CATV rules,

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[20] Midwest Television, Inc., operates a network-affiliated VHF station. When the Commission issued its interim order, a second petitioner, San Diego Telecasters, Inc., operated KAAR, an independent (nonnetwork affiliated) UHF station. The third petitioner, Jack O. Gross, holds a permit from the Commission to construct another independent UHF station. KAAR has temporarily suspended service and, since the filing of the certiorari petition, its assets and authorizations were transferred with FCC permission and are now held by Western Telecasters, Inc. A motion to substitute Western as a petitioner is being filed contemporaneously with this brief. The Commission has also been informed by Gross that he has agreed to transfer his authorization and that an application for approval will soon be filed.

[21] Mission Cable TV, Inc., owns several CATV systems in the San Diego area and holds franchises for others. Pacific Video Cable Co. owns CATV systems in an area near San Diego. Trans-Video Corp. is the owner of both Mission and Pacific and the operator of their systems and of the system owned by Southwestern Cable Co. which is located in the City of San Diego.

were importing into the San Diego area on a rapidly expanding basis the signals of six to nine Los Angeles television stations (A. 148-49).[22] San Diego, fifty-fourth largest television market in the country, was served by four San Diego area English language television stations—comprising three VHF stations affiliated with the three national networks and one independent UHF station—and by one Spanish language station (A. 148). In addition to a permit issued to petitioner Gross for a second independent UHF station, an application was pending for authority to construct a noncommercial UHF station, and the Commission was considering assignment of an additional UHF commercial channel to San Diego (A. 148).

It was also shown that as a result of CATV, viewership adequate to sustain the seven existing and potential San Diego area stations was being increasingly dissipated by importation of six to nine Los Angeles signals. Giving full effect to the nonduplication rule, nonetheless a large portion of the programs carried by the Los Angeles stations during a given week were substantially or exactly duplicated by programs available from the San Diego stations (A. 150).[23] Further significant expansion of respondents' CATV systems, which was imminent, would seriously dilute the

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[22] In April 1965, when the Commission issued its rulemaking notice leading to the present rules and placed existing and potential CATV operators on notice that it was considering sharp limitations on outside signal importations to which they would be subject, see p. 8 *supra*, Southwestern's system was not in existence while the Mission group had less than 6,000 subscribers according to exhibits it submitted to the Commission. Service to several San Diego area communities was initiated only two to four months prior to the filing of the petition in this case (A. 149).

[23] As the Commission itself recognized (A. 24, 117), the nonduplication rule by itself is inadequate because, as already noted, it only relates to identical programs received the same day and most duplication of nonnetwork programs occurs earlier than or subsequent to the local broadcast. See n. 11 *supra*.

viewing audience to the point of imperiling the ability of existing stations to provide sound and attractive programming and of the unborn UHF stations to come into being (A. 151).

Accordingly, the Commission was requested to restrain permanently after a hearing, with temporary relief in the interim, any further expansion of the transmission of Los Angeles signals over respondents' CATV systems into new geographic areas. Opposing affidavits and pleadings were submitted by respondents. After considering the voluminous papers before it, the Commission ruled that there existed "a classic case" for a full evidentiary hearing on CATV's impact on San Diego television (A. 161) and designated the case for hearing. The Commission's opinion took particular note of the "considerable UHF activity currently under way in San Diego" and of the respondent CATV systems' "potential for expanding throughout the entire county" (A. 162).[24]

The Commission found interim relief to be essential, noting that in its absence "within a very short period of time the systems could wire up thousands of new subscribers" (A. 163). It emphasized, as it had in the Second Report and Order, "the impracticability of withdrawing service, once established, because of its disruptive effect" and "the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted" (A. 163). Consequently, without curtailing the addition of new subscribers to receive signals of San Diego

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[24]The respondents had wired up only a relatively small number of homes located in discrete communities or areas; on the grandfather date, about 17,000 homes (4.6 percent) within Midwest's Grade A contour were CATV subscribers, grouped in eight islands of service (A. 152 n. 3, 163). However, CATV cable lines had been laid in portions of communities with 294,000 of the homes (78 percent) within that contour and CATV franchises covered 90 percent of the homes (A. 163).

area stations, it halted pending the hearing the expansion of transmission of Los Angeles signals outside designated geographic areas in which the systems were operating on the grandfather date (A. 170-72).

Respondents appealed the Commission's grant of temporary relief to the Court of Appeals for the Ninth Circuit. After modifying the Commission's interim stay pending review to allow new subscribers to be added to trunk and feeder lines existing at the date of the order (A. 180), the Ninth Circuit ruled that the Commission lacked statutory authority to issue the order. The court's opinion stated that, in light of *Regents* v. *Carroll*, 338 U.S. 586 (1950), "sections 4(i) and 303(r) [of the Communications Act, 47 U.S.C. §§ 154(i), 303(r) (1964), conferring on the Commission general authority to make necessary rules and orders] are limited to the scope of the Commission's licensing authority" (A. 192). The court entered a judgment setting aside the Commission's grant of interim relief (A. 194) but stayed its own mandate pending certiorari proceedings. At the request of the Solicitor General, Mr. Justice Brennan amended the stay of mandate to permit additional time for the filing of a certiorari petition.[25]

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[25] After conducting the hearing ordered on permanent relief, the FCC's hearing examiner on Oct. 3, 1967, issued an initial decision declining to limit CATV expansion in the San Diego area although proposing other types of relief. Respondent Southwestern then moved the Commission to vacate its temporary stay. On Nov. 8, 1967, the Commission denied the motion pointing out that exceptions were being filed to the initial decision and "the examiner's conclusions as to the significance of the evidence of record do not constitute a final determination." It added that "Southwestern's [financial] position is improving rather than deteriorating" and emphasized its willingness to reconsider if circumstances changed. Memorandum Opinion and Order, FCC 67-1224, at 5.

SUMMARY OF ARGUMENT

I. The Communications Act of 1934 confers upon the Commission ample authority to regulate CATV carriage of television station signals. The Act applies to "all interstate ... communication by wire or radio," section 2(a), 47 U.S.C. § 152(a) (1964), and CATV constitutes "communication by wire or radio" as defined by the Act, sections 3(a), 3(b), 47 U.S.C. §§ 153(a), 153(b) (1964), and is "interstate" communication because the signals are in the stream of interstate commerce, *Federal Radio Comm'n* v. *Nelson Bros.*, 289 U.S. 266 (1933). *Regents* v. *Carroll*, 338 U.S. 586 (1950), does not limit the Commission's authority over CATV; that case involved not only a private dispute but also the Commission's power over private parties not asserted to be engaged in interstate communication by wire or radio.

Further, the Commission is granted power "to establish areas or zones to be served by any station," to distribute television stations themselves among the states and communities, sections 303(h), 307(b), 47 U.S.C. §§ 303(h), 307(b) (1964), and to make rules, restrictions and orders necessary to the implementation of the Communications Act, sections 4(i), 303(r), 47 U.S.C. §§ 4(i), 303(r) (1964). Such legislation conveys adequate authority to carry out the basic statutory functions and to contend with related activities threatening to frustrate the legislative scheme. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *American Trucking Associations* v. *United States*, 344 U.S. 298 (1953). The District of Columbia Circuit Court of Appeals in *Buckeye Cablevision, Inc.* v. *FCC*, No. 20274 (June 30, 1967), held that the Commission can regulate CATV television signal carriage, properly concluding that its statutory authority is not rigidly compartmentalized into station licensing and common carrier regulation. See *Benanti* v. *United States*, 355 U.S. 96, 104 (1957); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934).

Lastly, authority over CATV is warranted to fulfill the statutory aims of television service to "all" Americans and a fair distribution of stations to individual communities, sections 1, 307(b), 47 U.S.C. §§ 151, 307(b) (1964), which the Commission has sought to achieve through a television structure, approved by the courts and the Congress, which is based on widespread local broadcasting stations and relies heavily upon UHF channels. *Logansport Broadcasting Corp.* v. *United States*, 210 F.2d 24 (D.C. Cir. 1954); H.R. Rep. No. 1559, 87th Cong., 2d Sess. 4 (1962). If unregulated CATV is allowed to destroy the emerging local television stations by duplicating local programs, failing to carry local stations and fragmenting audiences, free local broadcast service will be available only in large cities and numerous Americans who cannot afford CATV or live in rural areas outside its reach may be wholly deprived of television.

II. The Commission has authority to limit temporarily the expansion of CATV television signal carriage in the San Diego area of Los Angeles stations pending an evidentiary hearing to determine whether expansion would serve the public interest. As already noted, the introduction of distant signals into a major market where there is significant UHF activity presents "a serious question" of harm to the public interest (A. 57), and without interim relief substantial damage may be done while that question is resolved.

During the necessarily detailed investigation CATV expansion could do fatal injury to the public interest, and once entrenched CATV cannot practically be rolled back, as the grandfather rules implicitly recognize and the Act confirms in analogous situations. Section 319, 47 U.S.C. § 319 (1964). Under established precedents, the Commission's power to issue necessary rules and orders authorizes issuance of an order so essential to fulfillment of its statutory responsibilities, and decisions in both the Tenth and District of Columbia Circuits squarely support the use of such powers to impose temporary restraints. *Amerada Petroleum Corp.* v. *FPC*, 293 F.2d 572 (1961), *cert. denied*, 368 U.S. 976

(1962); and *R.A. Holman & Co.* v. *SEC*, 299 F.2d 127, *cert. denied*, 370 U.S. 911 (1962).

Respondents, afforded ample opportunity to submit in writing any contentions and evidence they wished, were deprived of no procedural rights due them. Section 312, 47 U.S.C. § 312 (1964), requiring a hearing for issuance of cease-and-desist orders, was not and could not be applied. In terms and in policy it is directed at issuing permanent restraints against violation of particular statutes, regulations, or license provisions while the order here is merely an interim measure to assure that the public interest would not be frustrated pending a full hearing on what the public interest ultimately required. There is no automatic right to a hearing or oral presentation. *FCC* v. *WJR*, 337 U.S. 265 (1949); *American Broadcasting Co.* v. *FCC*, 179 F.2d 437 (D.C. Cir. 1949). In any event, in the present case virtually all the facts relevant to the interim order were not in dispute.

ARGUMENT

I. THE COMMISSION HAS AUTHORITY UNDER THE COMMUNICATIONS ACT OF 1934 TO REGULATE THE TRANSMISSION OF TELEVISION SIGNALS BY CATV SYSTEMS.

The decision below held invalid the Commission's interim order limiting expanded CATV transmission in the San Diego area of Los Angeles television signals, an order issued after receipt of substantial cross pleadings and affidavits and designed to safeguard the public interest in free local television broadcast service pending a full evidentiary hearing on the impact of such expansion on that service. The central rationale of the court's opinion appears to be that the Commission entirely lacks authority to regulate CATV systems directly because its statutory power does not extend beyond broadcast station licensees. This reading is borne out by the

opinion's principal reliance upon this Court's decision in *Regents* v. *Carroll*, 338 U.S. 586 (1950).[26]

The overwhelming weight of statutory language, relevant precedent and policy considerations establish the Commission's authority to regulate television signal transmission by CATV, and the District of Columbia Circuit so held in *Buckeye Cablevision, Inc.* v. *FCC*, No. 20274 (June 30, 1967).[27] As we shall show, (A) the Commission's express authority over interstate communications by wire or radio encompasses CATV systems and definitively distinguishes *Carroll*; (B) the broad powers granted by the Communications Act and elaborated in judicial decisions amply warrant Commission regulation of CATV transmission; and (C) such regulation is essential to the express purposes of the Communications Act, to the local broadcasting structure which the Congress has approved and to the public interest generally.

A. *The Scope of the Statute*

The Communications Act is designed to provide unified federal control over interstate wire and radio communication. The statute affirms this broad scope in the first section, stating that its enactment is "for the purpose of regulating interstate . . . commerce in communication by wire and radio . . . ." Section 1, 47 U.S.C. § 151 (1964). The second section makes clear that "the provisions of this [Act] shall apply to all interstate . . . communication by wire or radio . . . and to all persons engaged within the United States in such communication . . . ." Section 2(a), 47 U.S.C. § 152(a) (1964).

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[26] It is confirmed by a later decision of the Ninth Circuit, Valley Vision, Inc. v. United States, Nos. 21869-70 (June 29, 1967) (order). See p. 38 *infra*.

[27] The *Buckeye* decision, not yet officially reported, is reprinted at page 67 of the certiorari petition filed in No. 363 by the United States and the Commission.

CATV systems are engaged in interstate communication by wire or radio as defined by the Act. Sections 3(a) and 3(b) define wire and radio communication respectively as "transmission" "by aid of wire, cable, or other like connection" in the former instance, and "by radio" in the latter, of "writing, signs, signals, pictures, and sounds of all kinds" and as "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. §§ 153(a), 153(b) (1964). Unquestionably CATV systems receive, transmit and deliver signals, pictures and sounds by wire.[28]

That this transmission constitutes "interstate" communication is well settled by the authorities. The CATV systems are part of the stream of continuous interstate communications by radio and television. *Federal Radio Comm'n* v. *Nelson Bros.*, 289 U.S. 266 (1933); *Buckeye Cablevision, Inc.* v. *FCC*, No. 20274 (D.C. Cir., June 30, 1967). They are thus within FCC jurisdiction even though located within a single state.[29]

Under the circumstances it is not surprising that petitioners do not quarrel with the basic proposition that their CATV systems are engaged in interstate communication. Indeed, CATV operators acting through their national trade association, the National Community Television Asso-

[28] They also engage in radio communication as instrumentalities incidental to the transmission of the sending station's signal. Clarksburg Publishing Co. v. FCC, 225 F.2d 511 (D.C. Cir. 1955). It is unquestioned that "radio" as used in the Communications Act embraces television signals. Allen B. Dumont Labs., Inc. v. Carroll, 184 F.2d 153 (3rd Cir. 1950), cert. denied, 340 U.S. 929 (1951).

[29] See Fisher's Blend Station, Inc. v. State Tax Comm'n, 297 U.S. 650 (1936); Ward v. Northern Ohio Tel. Co., 300 F.2d 816 (6th Cir.), cert. denied, 371 U.S. 820 (1962); United States v. American Tel. & Tel. Co., 57 F.Supp. 451, 454 (S.D.N.Y. 1944), aff'd per curiam sub nom. Hotel Astor v. United States, 325 U.S. 837 (1945); Idaho Microwave, Inc. v. FCC, 352 F.2d 729 (D.C. Cir. 1965).

ation, have strongly argued to state public utility commissions – in an effort to escape regulation by state bodies – that CATV systems "are unquestionably engaged in interstate commerce" and are "directly concerned with television broadcasting, an area of governmental control which there has been complete occupation by the Federal Government . . . ." Brief of NCTA Before the Conn. PUC, Docket No. 10250, pp. 3, 9 (1964).

CATV's status as interstate communication by wire or radio cannot be evaded by labeling the systems "master antennas" or seeking to assimilate them to home television receivers. These characterizations are contrary to fact and have been rejected outright by the Commission (A. 56) and by the courts. See, *e.g.*, *Buckeye Cablevision, Inc.* v. *FCC* No. 20274 (D.C. Cir., June 30, 1967). Similarly, in *United Artists TV, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177, 180 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *cert. granted*, 36 U.S.L.W. 3221 (Dec. 4, 1967) (No. 618), the court described "community antenna" as a "misnomer" reflecting a "fundamental misconception":

> "Nor are defendant's [CATV] operations simply that of passive 'antennas' used only to receive telecasts. In fact, defendant's two systems, among other processes, receive, electronically reproduce and amplify, relay, transmit and distribute television programs– operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas."

Understanding the true nature of CATV systems, summed up in a later passage in the *Fortnightly* opinion as "in material respects, analogous to television stations, translator and repeater stations," 255 F. Supp. at 196, should lay to rest all efforts to invalidate CATV regulation by wrongly classing the systems with other objects decidedly outside Commission authority. Unlike home antennas, newspapers, movies theaters and numerous other objects and enterprises, CATV systems are engaged in interstate communication by

wire or radio, the subject of the Communications Act. The Commission's assertion of authority and its rationale go no further.

Carroll, whose language the Court of Appeals found "guided" its "resolution" of the present case (A. 190), dealt with a legal question wholly unrelated to that presented here. That case grew out of a refusal of the Commission to renew a radio station license until its licensee repudiated a contract to purchase the stock of a nonlicensed company formerly engaged in managing the station for the licensee. When the licensee did so, the selling stockholders sued in state court and recovered an award of contract damages from the licensee. Upholding the judgment against a claim that under the Supremacy Clause it was barred by the Commission's action, this Court stated that the Commission's statutory power to make necessary rules and conditions had to be construed "in connection with" its licensing power and "cannot directly affect the [license] applicant's responsibilities to a third party . . . ." 338 U.S. at 600.

The management company in *Carroll* was an unlicensed private concern with no asserted relationship to the Commission or status under the Act and its stockholders were the actual parties to the contract. Indeed, the controversy arose because the Commission objected to having the station actually managed not by its licensee but by a third party. By contrast, the CATV systems are entities engaged in interstate communication by wire or radio whose regulation is the statute's declared aim and the very purpose of the Commission.[30]

The court below in resting its decision upon *Carroll* ignored this Court's reiterated warning against the borrowing of abstract language from opinions without due regard

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[30]The other Supreme Court decision quoted by the Ninth Circuit, FCC v. American Broadcasting Co., 347 U.S. 284 (1954), simply forbade the Commission to outlaw "giveaway" programs as lotteries in the face of a federal statute governing the subject and has no bearing on the present case.

for differing facts,[31] language which in *Carroll's* case was largely directed to a statutory gap that has since been filled by the Congress. 66 Stat. 17, adding section 312(b), 47 U.S.C. § 312(b) (1964). In the words of the Court of Appeals for the District of Columbia Circuit, affirming the Commission's power over CATV in the face of an identical argument:

> "We do not have to decide the degree to which *Carroll* may still be viable since we think that, in any event, it does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme." *Buckeye Cablevision, Inc.* v. *FCC*, No. 20274 (June 30, 1967), p. 7.

B. *The Commission's Regulatory Powers*

The powers with which the Communications Act endows the Commission are ample to encompass regulation of CATV transmission by the Commission – the only aspect of CATV operations over which authority is claimed. There is no attempt to franchise or otherwise regulate entry into business, determine the number of CATV systems that may operate in particular areas or fix rates.

Central to the Commission's authority is its power "to establish areas of zones to be served by any station" and its mandate to distribute "licenses, frequencies, hours of operation, and of power among the several States and communities [so] as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Sections 303(h), 307(b), 47 U.S.C. §§ 303(h), 307(b) (1964). These sections provide the foundation of the Commission's carefully planned table of assignments. Yet they are hollow if they furnish no basis for harnessing CATV operations. There can be no meaningful areas or zones or effective distribution of stations if CATV remains free to carry stations au-

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[31] *E.g.*, United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 395 n. 22 (1956); Hughes v. Superior Court, 339 U.S. 460 (1949).

thorized to serve the Los Angeles area a hundred miles away and disseminate their signals in the San Diego area ultimately at the cost of San Diego local service.[32]

The statute also grants the Commission generous power "to make such rules and regulations, and issue such orders" not inconsistent with the Act "as may be necessary in the execution of its functions" and, in a later section, to "make such rules and regulations and prescribe such restrictions and conditions" not inconsistent with the Act "as may be necessary to carry out [its] provisions . . . ." Sections 4(i), 303(r), 47 U.S.C. §§ 154(i), 303(r) (1964). Illuminated by the precedents, these provisions reinforce the Commission's more specific powers.[33]

The decisions of this Court and of lower tribunals establish that regulatory statutes which provide basic policy responsibilities and broad powers are intended to permit the agency to carry through the basic aims of the Congress and to contend with aligned activities and problems not detailed in the statute that threaten to frustrate the legislative pur-

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[32] As the Commission has noted, "in addition . . . there exists [in CATV] the potential to frustrate the purposes of the act embodied in secs. 303(p), 310, 315, 317, and 508 [47 U.S.C. §§ 303(p), 310, 315, 317, 508 (1964)] (and certain Commission regulations)" (A. 70 n.4).

[33] The court below apparently regarded the significance of these sections as somehow diminished by their "placement . . . within the structure of the Act" (A. 188 n. 5). We will not discuss here the relative importance of their neighboring provisions nor even the fact that the Act does not rank its provisions in importance by their "placement." In all events: "there is no dearth of decisions making it clear that [such provisions] are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act." Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 158 (D.C. Cir. 1967). See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

pose. "A broad delegation of power is not only a power, it is a summons to create order." Jaffe, Judicial Control of Administrative Action 49 (1965). The precept is well illustrated in *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), construing the Communications Act itself. Upholding the Commission's power to adopt rules regulating network-station practices nowhere mentioned in the statute, the Court emphasized that "the Act gave the Commission not niggardly but expansive powers" and sought not "to frustrate the purposes for which [it] was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency." 319 U.S. at 219-20.

The Court reiterated the same fundamental principle in *American Trucking Associations v. United States*, 344 U.S. 298 (1953), which sustained the Interstate Commerce Commission rules directed at carrier use of equipment over which the Commission lacked general authority under a statutory exemption. Observing that "the rules in question were aimed at conditions which might directly frustrate the success of the regulation undertaken by Congress," the Court relied expressly upon the statutory duty of the Commission, no broader than the FCC's grant, "'[t]o administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration.' § 204(a)(6)." 344 U.S. at 311. As the Commission has found in its Second Report and Order, CATV transmission is within its jurisdiction and subject to its powers and yet, if unregulated, threatens to frustrate those very powers and the larger purposes those powers are designed to serve. It was similarly the Commission's duty to regulate CATV.

Unencumbered by a mistaken reading of *Carroll*, the Court of Appeals for the District of Columbia Circuit found the lessons of *National Broadcasting* and *American Trucking Associations* squarely applicable to the problem of Commission authority over CATV. In *Buckeye Cablevision, Inc.* v. *FCC*,

No. 20274 (June 30, 1967),[34] a unanimous panel of the District of Columbia Circuit rejected the same array of arguments pressed by respondents below and, bolstered by the cases which have recognized the authority of an agency "to deal with aligned activities which may affect the regulatory system entrusted to the agency," held the congeries of powers entrusted to the Commission readily support its jurisdiction over CATV television signal transmission. P. 8.[35]

Buckeye also rejected the contention, advanced below, that the Communications Act's legislative origins show it to be a mere consolidation of common carrier and radio station licensing statutes, that this division is continued respectively in titles II and III of the present statute, and that CATV is outside the Act because neither a common carrier nor a licensed radio station. Even were attention focused solely upon title III drawn from the old Federal Radio Act, its scope is by no means limited to station licensing. The title is designated "provisions relating to radio" – not "radio station broadcasters" – and it contains a number of provisions that say nothing of station licenses or licensees.[36] CATV rules which concern carriage of television signals and are vi-

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[34] It may be noted that, despite the importance of *Buckeye* and its conflict with the previously decided case below, the CATV system did not seek certiorari.

[35] In so doing, the court bore out the intimations of other panels in earlier cases whose language foreshadowed *Buckeye* itself. See Clarksburg Publishing Co. v. FCC, 225 F.2d 511, 517 (1955); Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359, cert. denied, 375 U.S. 951 (1963); Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (1966).

[36] *E.g.*, sections 303(g) ("generally encourage the larger and more effective use of radio"); 303(s) (the Commission may require that television sets be manufactured to receive UHF); 313 (antitrust laws application to radio manufacture, sale and trade); 328 (Secretary of State represents Canal Zone in international radio), 47 U.S.C. §§ 303(g), 303(s), 313, 328 (1964).

tal to preserve express powers over transmission range very much "relate to radio."

More fundamentally, this "suggestion that the Commission's powers are rigidly compartmentalized into 'licensing' and 'public utility regulation' functions," *Buckeye, supra,* p. 7 n. 19, is repugnant to the Act's language, its history, and judicial precedent alike. The statute applies to "*all* interstate . . . communication by wire or radio." Section 2(a), 47 U.S.C. § 152(a) (1964) (emphasis added). Far from being a mere aggregate of scattered statutes it is a self-asserted grant "of *additional* authority with respect to interstate and foreign commerce in wire and radio communication . . . ." Section 1, 47 U.S.C. § 151 (1964) (emphasis added). The Commission was created "to regulate all forms of communication," H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 3, (1934), and the statute itself—in this Court's words—constituted "a comprehensive scheme for the regulation of interstate communication." *Benanti* v. *United States,* 355 U.S. 96, 104 (1957). While its detailed provisions naturally aimed at the subjects most familiar to the Congress and urgent to the times, "Congress in passing the Communications Act of 1934 could not . . . anticipate the variety and nature of methods of communication by wire or radio that would come into existence. . . . In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry." *Philadelphia Television Broadcasting Co.* v. *FCC,* 359 F.2d 282, 284 (D.C. Cir. 1966).[37]

[37]This language is particularly significant since the court held that it was a "rational and hence permissible choice" by the Commission to reject a petition to regulate CATV systems as common carriers and rather to regulate them as "adjuncts of the nation's broadcasting system." 359 F.2d at 284. For an earlier articulation of the proposition that the statute must be looked at as a whole and that the Communications Act does not require the FCC to fit its actions into a particular subcategory of communications, see Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359, 362 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

These established statutory powers are in no way circumscribed by supposed past disclaimers by the Commission of authority over CATV or its efforts to obtain CATV legislation from Congress. The Second Report and Order's analysis of past Commission decisions adequately demonstrates that there is no settled administrative interpretation favoring CATV immunity from control (A. 8-9). Even if there were such an interpretation, the Commission is not foreclosed from correcting past errors.[38]

Nor may adverse inferences be drawn from the Commission's request for "congressional guidance as to policy and congressional clarification of our authority" in the CATV field (A. 63). An agency must be entitled and encouraged to clarify its mandate and avoid litigation even though itself certain of its authority. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950); *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966). The Congress had explicitly taken no position on the jurisdictional question, H.R. Rep. No. 1635, 89th Cong., 2d Sess. 9 (1966), and its failure to enact legislation governing CATV, if it warrants any inference, would suggest that it is content to allow the Commission to proceed with its CATV rules.

C. *Statutory Purposes and Federal Policy*

We have shown that regulation of CATV transmission is supported by the express scope and statutory powers of the Act. Such regulation is also essential to fulfill the program designed by the Commission and approved by the courts and the Congress "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide ...

[38] As this Court said of the ICC last Term: "the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . In fact . . . this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency." American Trucking Associations v. Atchison T.&S.F.R.R., 387 U.S. 397, 416 (1967).

wire and radio communication service," and to provide "a fair, efficient, and equitable distribution" of television broadcast service throughout the country. Sections 1, 307(b), 47 U.S.C. §§ 151, 307(b) (1964).

The national television broadcasting structure described above in the Statement furthers both of these statutory purposes. That structure is aimed at providing first, free television broadcast service for all Americans, second, local or area stations for as many communities as possible, and third, multiple service for large numbers of Americans. See pp. 3-4 *supra*. Local stations give access to national programming while preserving the many benefits of community coverage, such as local news and weather, forums for state and local affairs, entertainment and cultural programs meeting the interests of the community, and business information and advertising suited to local enterprise. By multiplying stations and limiting ownership and control the Commission avoids the dangers of concentrating influence in a few hands, assures broadcast service in national or local emergencies when central communication may be lost and lays the groundwork for advances such as additional national networks, new regional and special networks and more diverse local voices.[39] In short, the Commission's program represents a planned and principled effort of the kind properly urged upon regulatory agencies by courts and critics,[40] and its approval by the courts and by the Congress

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[39] See Second Report and Order (A. 46, 51); Sixth Report and Order, 1 P & F Radio Reg. 91:601, 622-24, 17 Fed. Reg. 3905, 3912-13 (1952). In adopting this approach, the Commission rejected the so-called DuMont plan for superpower stations concentrated in a few major cities blanketing the country with their programs, the very effect unregulated CATV is destined to produce. *Id.* at 91:622, 17 Fed. Reg. at 3913.

[40] See Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 142-147 (1962). It provides a marked contrast with the random development of AM radio where licenses were long passed out almost on demand and without regard to long-range need or policies.

firmly establishes it as a national policy. See pp. 4-6 & nn. 3, 5-7 *supra*.[41]

As the Commission has found, CATV harbors the potential to scuttle UHF development and undermine the present and potential local broadcasting system, thereby frustrating established public policy, making the all-channel receiver legislation an exercise in futility and wasting the large investment in UHF stations and in sets purchased to receive them. At the very time that UHF television approaches the critical state in its evolution, with new stations striving to gain a foothold and potential applications in the balance, "CATV growth has been explosive and gives every indication of continuing its phenomenal spurt" (A. 47). Indeed, "CATV activity is accelerating in areas where there is the greatest interest in UHF development" (A. 15). See pp. 7-8 *supra*. The comparatively straightforward economics of television broadcasting — the vital relationship between audience and revenues (or educational television gifts and grants) — makes it certain that program duplication, locking local stations out of CATV homes and general audience fragmentation through expanding CATV importation of outside signals presents a significant danger to local television. This has been the Commission's expert judgment and the evidence backing up its evaluation is detailed in the Commission's lengthy First Report and Order, 38 F.C.C. 683 (1965), and Second Report and Order (A. 1).

The considerations supporting Commission authority are unaffected by recognition of CATV's liability under the

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[41] The House Report on the all-channel receiver law has described UHF television as "not only the best but the only practical way of achieving an adequate commercial and educational system in the United States" and declared the national goal to be to "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression" with additional stations proportionate to the size of the population. H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3-4 (1962).

copyright laws, the question pending in No. 618, *Fortnightly Corp* v. *United Artists TV, Inc.* Copyright application to CATV and Commission regulation have complementary but different functions; they are not alternative regimes for governing CATV. Each derives from different principles and is directed to different, albeit to some extent, overlapping, interests. Neither one legally or practically obviates the need for the other.

Copyright aims to secure for the creator of a work the choice of the methods of marketing it among users and to prevent its commercial exploitation by those who do not pay for his permission. It is these principles, and precedents such as *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), that lie behind the just claim that CATV systems are liable for use of copyrighted works.[42] The Communications Act serves the quite different, though not inconsistent, end of regulating radio and television communications in accordance with policies spelled out in the original statute and in later legislation such as the all-channel receiver law.

Recognition of CATV's responsibility to the copyright owner in no way dispenses with the practical importance of Commission authority to safeguard the public interest in free, local broadcasting. As to copyrighted programs, the reasonable assumption is that the owner and the CATV system would frequently agree upon a license, leaving the latter free to carry programming into the local station mar-

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[42]The argument that CATV liability will give the copyright owner "double" payment, because the station will itself increase its copyright license payment in proportion to expanded CATV coverage, is both inaccurate and irrelevant. For example, some station advertisers are local and have no interest in the market reached by CATV. Even if there were a proportionate rise, the copyright owner is as much entitled to reap the full rewards of his copyright here as he would be if two separately located local stations broadcast his work simultaneously.

ket devastating the local audience base as always. For the numerous programs which are not copyrighted at all, the CATV systems would continue to take them off the air at will. In all events, the Congress intended that the Commission assume responsibility for development of radio and television and declined to leave one of the Nation's "most valuable and limited natural resources," H.R. Rep. No. 1559, 87th Cong., 2d Sess. 5 (1962), wholly to the vagaries of the marketplace.[43]

In the face of the CATV threat to local broadcasting, the Commission has asserted its jurisdiction in a markedly restrained manner.[44] The requirements that, on a priority of signal basis, CATV carry local stations and abstain from duplicating local programs on the same day are beyond reasonable criticism. The public interest is not served by locking local stations out of CATV-served homes or importing distant signals which carry the identical program avail-

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[43]Conversely, the CATV rules do not seek to do the job of the Copyright Act, as the Commission has made quite clear. The nonduplication rules do not apply, as a practical matter, to the large number of nonnetwork programs. See A. 24, ¶ 55; 116, 117. The distant signal rules leave the CATV systems free to carry the programs of many nonlocal stations without the consent of the copyright owner. Thus, without copyright a local station cannot bargain with the owner for local program exclusivity against CATV importation of the same program, although incongruously the economics of television broadcasting have long been based on the exclusivity each station receives as against other stations in the same town-(A. 54-55).

[44]The regulatory regime is especially mild compared to the obligations that would have ensued had the Commission exercised its option to govern CATV systems as common carriers as urged in *Philadelphia Television*. See p. 37 *supra*. In most cases common carriers within the Act's purview are obliged to furnish service on request, be "just and reasonable" in their rates and practices as determined by the Commission, and obtain a certificate of public convenience and necessity for any line or extension and Commission permission to discontinue service. Sections 201, 205(a), 214(a), 47 U.S.C. §§ 201, 205(a), 214(a) (1964).

able on the same day from the local station which has often paid handsomely for the exclusive right of distribution in the area. Yet should the Ninth Circuit be upheld in its view that the Commission lacks authority over CATV, the carriage and nonduplication rules could not be enforced.[45]

In framing the distant signal rules, the Commission declined to accept reasoned proposals for more stringent limits on CATV distant signal carriage (A. 66-69). New CATV systems remain free to import distant signals in certain circumstances upon a showing by them that it would be consistent with the public interest and in other circumstances unless a complaining party shows that it would not be consistent with the public interest.[46] 47.C.F.R. §§ 74.1107(a), (c), 74.1109(a) (1967). CATV systems operating on the grandfather date can continue carrying distant signals then being carried to existing subscribers and expansion of the systems outside their present geographic area is allowed unless the Commission finds limitations necessary in the public interest. 47 C.F.R. § 74.1107(d) (1967).

If the Commission lacks power to prescribe bare-bones rules governing CATV, it cannot assure the fulfillment of the Act's express purposes to provide service to all Americans and guarantee a fair distribution of stations around the country. There is no fair distribution if uncontrolled CATV expansion devastates local broadcasting stations and if television broadcasting becomes the monopoly of stations in a

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[45] The proceeding initiated by the Commission, though not the temporary order on review in this Court, did in fact involve the question whether local signals were being degraded in the course of carriage by respondent systems (A. 172-73).

[46] The Commission has, in fact, administered its distant signal and related rules with considerable liberality toward CATV carriage of outside signals. *E.g.*, Cedar Rapids TV Co. v. FCC, No. 20783 (D.C. Cir., Sept. 27, 1967); Channel 9 Syracuse, Inc. v. FCC, No. 20843 (D.C. Cir., Sept. 26, 1967); Hubbard Broadcasting, Inc. v. FCC, No. 20924 (D.C. Cir., Oct. 30, 1967); In re Fetzer Cable Vision, 6 F.C.C.2d 845 (1967); In re Jonesboro Cable TV, Inc., 9 P & F Radio Reg. 828

few huge metropolises like New York, Los Angeles and Chicago. There is no service to all Americans if the demise of local broadcasting outside the largest cities leaves the rest of the country dependent upon CATV which requires ongoing payments difficult or out of reach for many Americans and which is not available at any price in rural areas.

It would be a mockery of congressional intentions if CATV were allowed to frustrate these policies by accomplishing for the television stations what they themselves could never do consistent with the statute. As the Commission stated, if stations in one market sought to extend their signals into another market by applications for auxiliary television transmitting stations it could not seriously be argued that the applications should be granted because "while they may be destructive of congressionally established goals, events in the marketplace should be allowed to give the answer. The matter is not really different here" (A. 52).[47]

This Court has repeatedly emphasized that the aims of legislation are a prime measure of the power it confers and has given full weight to national policy in its construction. See, *e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Piedmont & N.R.R.* v. *ICC*, 286 U.S. 299 (1932). Here the statutory purpose favors CATV regulation. The statute expressly covers such interstate wire or radio communication. The broad grant of power is ample to support the jurisdiction claimed. The case in support of the Commission's authority over CATV television signal transmission is thus overwhelming.

(1967); In re Community Antenna Co., 9 P & F Radio Reg. 1151 (1967).

[47] This conclusion applies not only to the goals relating to a nationwide pattern of local television stations but also to the FCC's rules and policies respecting concentration of control of the television medium in nearby areas such as Los Angeles and San Diego.

II. THE COMMISSION'S AUTHORITY TO REGULATE CATV SYSTEMS ENCOMPASSES A TEMPORARY STAY OF THEIR EXPANSION PENDING A PLENARY HEARING TO DETERMINE WHETHER IT WOULD SERVE THE PUBLIC INTEREST.

Given the authority of the Commission to regulate CATV importation of outside signals and given also its conclusion that this authority should be exercised through procedures that enable it to determine the public interest on a case-by-case basis, the further question is presented whether the Commission can prevent such importation while it is making such a determination.

The respondents argued in the court below that the Commission's temporary order limiting the further importation of Los Angeles signals into the San Diego area during the hearings on the public interest issues was invalid because, even assuming Commission authority to regulate such CATV transmission, no prior evidentiary hearing had been held. The paradoxical quality of this argument should be noted from the outset since the Commission could have exercised its authority over CATV transmission by issuing a general rule freezing CATV expansion of outside signal importation completely as was urged by various parties in the rulemaking proceeding. See pp. 51-52 *infra*. It would be ironic indeed in these circumstances if the far less restrictive system of regulation adopted by the Commission were to fail.

It should also be noted that the lack of an evidentiary hearing was not of significant concern to the court below, for its opinion concentrates upon Commission power to to regulate nonlicensees. Its preoccupation with the threshold question of basic authority was again revealed in a later case where the Ninth Circuit cited its present opinion as the sole authority for staying Commission enforcement of its CATV rules even though the Commission was not alleged to have denied any procedural rights whatever. *Valley Vision, Inc.* v. *United States*, Nos. 21869-70 (June 29, 1967) (order). However, since respondents will doubtless renew their procedural contention, we will show (A)

that provisions of the Act, the circumstances of the case and settled case law sanction the temporary stay and (B) that all due procedural requirements for its issuance were accorded.

A. *Power To Grant Interim Relief*

The Commission's grant of an interim stay is properly grounded in its express power to issue orders and prescribe restrictions requisite to accomplish its statutory responsibilities. Section 4(i), 47 U.S.C. § 154(i) (1964) provides:

> "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions."

See also Section 303(r), 47 U.S.C. § 303(r) (1964).[48]

There is no provision of the Act or any other law "inconsistent" with the Commission's temporary stay directed at CATV systems – enterprises that are subject to its jurisdiction.[49] The temporary stay is "necessary" in the context of the regulation of CATV signal transmission to prevent irreparable injury to the statutory policies entrusted to the Commission.

The bond between the legislative aims expressed in the Communications Act and underlying the all-channel receiver law and the further development of local broadcasting outlets has already been established, both in earlier discussion here, pp. 3-6 *supra*, and in the Second Report and

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[48] "Except as otherwise provided in this [Act], the Commission from time to time, as public convenience, interest, or necessity requires, shall–

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]. . . ."

[49] The suggestion that the Commission's order is invalidated by section 312, 47 U.S.C. § 312 (1964), is answered at pp. 50-53 *infra*.

Order (A. 46). The multiple dangers that unregulated CATV poses for such development, also fully documented, pp. 9-12 *supra* and A. 49-51, fully justify the Commission's restrained conclusion in the Second Report and Order that "a serious question" is presented "whether CATV operations in the major markets may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature" (A. 57).

The question arises very sharply when, as here, CATV systems seek to intrude nonlocal television signals into the heart of a television market where there is significant UHF activity, present and potential. Normally such intrusion will be attempted by extension of nonlocal signals beyond their Grade B contours. However, as the report makes clear, an identical hazard for local television may be presented if major markets fall within one another's theoretical contours and CATV works to equalize the quality of the nonlocal signals (A. 63).[50]

Accordingly, the Commission committed itself on a market-by-market basis to a "thorough exploration of the very important issues raised; they cannot be sloughed aside or the answers lightly assumed" (A. 58). Recognizing that market hearings might consume substantial time, the Second Report and Order pointed out that they would normally

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[50]The illustration used by the Commission involved two closely located, albeit quite distinct, markets: Washington and Baltimore. The hazard is all the greater where, as here, the markets are located 100 miles apart and the fortuitous location of the transmitters of the Los Angeles stations on a 6,000 foot mountain, TV Digest, Television Factbook No. 37, at 72-b to 82-b (1967), results in the penetration of marginal Los Angeles signals into only a small portion of San Diego. Unlimited CATV operations would equalize Los Angeles and San Diego signals throughout the entire San Diego area where Los Angeles signals are generally unusable off the air.

be confined to the major markets "where there is generally no dearth of service and new UHF services are coming on the air" (A. 58). The report listed among the many issues to be studied in each case the details of local CATV operations, marketing studies, present and future television service and pay-TV potential (A. 58).

A halt in CATV expansion during the course of a hearing is no less "necessary" than the hearing itself. As the Second Report and Order states, "Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation," should the hearing reveal that expanded CATV transmission is contrary to the public interest (A. 58). Expansion means not only that the CATV system will have made an investment but that subscribers will have had their televisions sets wired and their external antennas removed, often paying substantial installation fees. Thus, to safeguard the public interest from CATV operations in the major markets, "it is necessary to examine thoroughly such operations before they become established or well entrenched" (A. 58).

During the hearing unabated CATV expansion could do irreparable harm. Most UHF stations are in their early years of service operating on small profit margins or on invested capital or debt while securing an audience,[51] and they may easily succumb during proceedings which the Commission acknowledged "may consume some significant period of time" (A. 58). Moreover, new UHF activity would be discouraged if CATV expansion could not be stayed. Potential investors would turn permanently from UHF television to other opportunities if CATV activity jeopardized UHF prospects in otherwise attractive markets. Since "the next few years will supply the critical answer to whether the congres-

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[51] About one-third of the UHF stations now in operation did not exist five years ago and losses are frequent among new stations. See n. 15 *supra;* TV Digest, Television Factbook No. 37, at 52-a (1967).

sional goal of a truly nationwide television system employing both UHF and VHF on an effective intermixed basis will be achieved" (A. 47), interim relief is doubly essential.

The Commission's resolve to delay hazardous CATV expansion pending a hearing is consonant with "the basic thrust of congressional policy in the Communications Act" to determine "important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop" (A. 57-58). For example, section 319, 47 U.S.C. § 319 (1964), prohibiting issuance of a station license unless a construction permit is first secured, is declared by the Congress to reflect an intent to keep the Commission "free from the pressure which otherwise might be exerted by an applicant for a radio-station license who has made considerable expenditures towards construction of a station . . . ."[52]

The Second Report and Order applies this precept of preserving the status quo throughout the CATV regulations and in an evenhanded fashion. There is an automatic stay by rule of importation of non-Grade B signals into the Grade A contour of a station in the top 100 markets until the Commission has held an evidentiary hearing on the public interest or determined that a waiver of this requirement should be granted. 47 C.F.R. § 74.1107(a) (1967). In all other situations the burden is on the television station to seek relief against importation of outside signals.[53] 47 C.F.R. §§ 74.1107(c), 74.1109(a) (1967). But if such relief is sought within 30 days after notice is given by the CATV system of its intentions, there is an automatic stay under the rules

[52]H.R. Rep. No. 417, 83rd Cong., 1st Sess. 1-2 (1953). Similarly, sections 301 and 309 require decision on public interest questions before broadcasting stations can begin operations. 47 U.S.C. §§ 301, 309 (1964).

[53]These include the transmission of distant signals into the area between the Grade A and Grade B contours of a top 100-market station or anywhere within the service area of a station in a market below the top 100 as well as special "overlapping market" situations.

until the Commission has acted on the petition. 47 C.F.R. § 74.1105 (1967). On the other hand, although the rule requiring carriage of local stations applies to all CATV systems, a system may petition for waiver of this requirement and it need not comply with the rule until the Commission acts on its petition. 47 C.F.R. § 74.1109(h) (1967). The grandfather clause, allowing existing CATV systems to continue regardless of harm, bespeaks the same recognition that a *fait accompli* cannot gently be undone. See n. 56 *infra*. The very policy that permits respondents to continue established operations now and to expand in settled geographic areas is the premise of the temporary order they so vigorously attack.

It is apparent, moreover, especially in connection with the implementation of the distant signal and related rules and policies, that the concept of stays to maintain the status quo until the Commission can determine what course of action to follow in a particular situation is fundamental to the basic system of regulation adopted by the Commission. It would be fruitless for the Commission to contemplate, as it has, detailed inquiry to determine if particular CATV plans to import outside signals would be consistent with the establishment and healthy maintenance of television broadcast service in the area if the status quo could not be maintained while the Commission was determining what the public interest required. The necessity for this power is the same whether such inquiry is the result of a petition by a CATV system for a hearing or for a waiver of a hearing or whether, as here, the burden is on the television station to seek relief. The power to maintain the status quo is equally critical to the Commission's CATV regulatory scheme whether that power is exercised by a specific order as here or by the operation of the provisions of its rules which result in automatic stays.

The Commission's memorandum opinion and order instituting the present case is no less eloquent than the Second Report and Order in portraying the "necessity" for a tem-

porary stay, lest the hearing itself and the statutory policies it serves be frustrated. The Commission found that San Diego was a major market receiving multiple television service from existing San Diego stations and was the center of promising UHF activity. (A. 148-49). Respondents' CATV systems, importing signals of six to nine Los Angeles stations located a hundred miles away, were duplicating the great bulk of the San Diego stations' nonlocal programming while splintering the audience base among more than twice the allocated number of stations (A. 149).[54]

These systems had not yet captured the community, several being only a few months old (A. 149). But their recent activity and their wide franchises foreshadowed their massive potential,[55] and fully justified the Commission's conclusion in the memorandum opinion and order instituting the San Diego hearing and issuing the stay:

> "[U]nless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted" (A. 163).[56]

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[54] Figures cited by the Commission indicated "that over 94% of the Los Angeles programs carried on the respondents' systems in a given week have been, are being, or will be duplicated on San Diego stations in the same form or by way of San Diego equivalents" (A. 150).

[55] To repeat, CATV cable lines existed in portions of communities with 294,000 of the homes (78 percent) within Midwest's Grade A contour, and CATV franchises covered 90 percent of the homes in the contour (A. 162-63).

[56] In rejecting proposals that grandfather rights be allowed only to signals being transmitted in April 1965, when the rulemaking was

A temporary directive so well warranted by the aims of a statute, directed at its express objects of regulation, and creating no conflict with any of its terms is justified by the language of sections 4(i) and 303(r), especially when construed in accord with principles and precedents already discussed. See pp. 27-30 *supra*. It bears repeating that this Court has never hesitated to find that "necessary rule-making power" is "coterminous with the scope of agency regulation itself," *American Trucking Associations* v. *United States*, 344 U.S. 298, 311 (1953), and that this principle applies with special force to a Commission "established" "to maintain . . . a grip on the dynamic aspects of radio transmission" whose power, "in recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting," must be measured by the "corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).[57]

Decisions in both the Tenth and District of Columbia Circuits uphold agency power to take exigent temporary action under broad rulemaking authority. The Tenth Circuit decision is *Amerada Petroleum Corp.* v. *FPC*, 293 F.2d 572 (1961), *cert. denied*, 368 U.S. 976 (1962), sustaining the Federal Power Commission's temporary restraint on the filing of a new gas rate schedule while a previous one

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first noticed, the Commission stated: "The difficulty with such approaches, in our judgment, was the very substantial disruption to the CATV viewing public which could result from requiring a cessation of distant signal service in major markets significantly after CATV service had been initiated" (A. 101).

[57]Upholding the Commission's restriction on multiple ownership of broadcast licenses, this Court acknowledged that the challenged rules contained limitations "not specifically authorized by statute" but refused to limit the Commission's rulemaking authority to such specifics since sections 4(i) and 303(r) "grant general rulemaking power not inconsistent with the Act or law." United States v. Storer Broadcasting Co., 351 U.S. 192, 202-03 (1956).

was under investigation. The Natural Gas Act contains no explicit grant of such a power of indefinite delay; on the contrary, it expressly provides that the Commission may suspend rate increases for a *maximum* period of five months, implicitly indicating a congressional policy against suspensions unbounded in time. Section 4(e), 15 U.S.C. § 717c(e) (1964). The Court in sustaining the controverted power relied importantly on the grant in section 16 of the Act of authority to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as [the FPC] may find necessary or appropriate to carry out [the Act's] provisions," 15 U.S.C. § 717*o* (1964), language strikingly like section 4(i) of the Communications Act. See p. 39 *supra*.

The District of Columbia Circuit followed the same course of approving temporary action not authorized in specific terms in *R.A. Holman & Co.* v. *SEC*, 299 F.2d 127, *cert. denied*, 370 U.S. 911 (1962).[58] There, the court sustained the power of the Securities and Exchange Commission to suspend summarily a broker-dealer's privilege to underwrite exempted securities pending a hearing on charges against him, taking note of Commission's "broad rule-making powers." 229 F.2d at 132. This stay summarily deprived the broker-dealer of a portion of his existing business, while the FCC order challenged here merely stays expansion of the CATV systems in certain respects and was issued only after notice and submission of written statements, affidavits and documents by both sides.[59]

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[58] Other District of Columbia cases following *Holman's* liberal approach include Public Serv. Comm'n v. FPC, 327 F.2d 893 (1964) (Natural Gas Act), and Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153 (1967) (Federal Power Act).

[59] In its brief in opposition to certiorari, Southwestern sought to distinguish *Holman* on the ground that the power had been "contemplated" by the Congress (p. 22, n.17). On the contrary, a House and a Senate Report merely took note of the SEC regulation later contested in *Holman* without expressing approval or disapproval while "Con-

Against these cases supporting a liberal construction of rulemaking provisions, affirming their substantive scope, and applying them in aid of temporary restraints, the respondents have pressed two District of Columbia decisions, *Trans-Pacific Freight Conf. of Japan* v. *FMB*, 302 F.2d 875 (1962), and *Standard Airlines, Inc. v. CAB*, 177 F.2d 18 (1949). Neither was cited by the Ninth Circuit in its opinion and neither is in point. Both cases involved agency orders which in effect suspended authority previously granted by them and essential or integral to the on-going business of the private parties.[60] That special procedural treatment may be afforded the withdrawal by an agency of authority previously granted by that agency and relied upon by the private party, *e.g.*, section 316, 47 U.S.C. § 316 (1964), has no bearing on the present case. The Commission never authorized the CATV systems. They proceeded at their own risk in the face of warnings from the Commission. See p. 8 *supra*. Moreover, the order here was directed against future expansion; it did not affect existing operations.

In addition, both cases treated the problems before them in the specific context of particular interim orders sought to be premised on particular statutes. Neither opinion purports to lay down a rule governing all configurations of facts and authority, nor does it appear that in either the court saw a significant public interest consideration favoring the stay or dealt with a provision like section 4(i) as a source of authority. Even on their own facts both decisions have been undermined by later authority at least in part: *Trans-Pacific*, which

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gress" never considered it at all. Mission's opposition argued that the court in *Holman* did not pass upon the SEC's statutory power (p. 15), but the court referred to the Commission's broad rulemaking authority and it is inconceivable that it would have upheld the Commission if it had any doubt about the Commission's power.

[60] In *Trans-Pacific*, the Commission sought to restrain a fine levied under authority of a shipping conference agreement previously approved by the agency, while in *Standard Airlines* an airline "letter of registration" was at issue.

relied heavily on prior agency practice, by Supreme Court decisions rejecting that emphasis, see n. 38 *supra*, and *Standard Airlines*, by decisions limiting the need for hearings.[61]

There is, finally, nothing to the suggestion that a temporary stay from a court under *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966), would be an adequate and appropriate substitute for FCC interim action. The appraisal of mergers such as that involved in *Dean Foods* is a function normally performed by courts. At the same time the number of stays sought by the FTC is unlikely to be so vast as to clog the judicial docket. By contrast, the FCC is best suited to make the initial expert judgment required in considering whether the public interest warrants staying CATV expansion, and the Commission's opinion in this case reveals the wealth of technical considerations involved (A. 146). The number of CATV systems likely to demand court proceedings would also heavily burden both the Commission and the courts.

For the FTC, court-granted interim relief may be the suitable course. That agency lacks the broad statutory powers of the FCC, does not have the far-reaching implementing power of section 4(i) of the Communications Act, and shares primary responsibility for merger matters with the courts and Department of Justice. The FCC, however, has basic responsibility for radio and television, consonantly broad authority, and a demonstrated need to grant the relief at issue while carrying out its exclusive function of framing permanent public-interest limitations on San Diego CATV television signal carriage.

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[61] *Standard Airlines* was distinguished by the court in *Holman* on its facts as involving "different competing interests," 299 F.2d at 132 n.9, but *Holman* plainly represents a change in approach. *Standard Airlines* relied in part upon WJR v. FCC, 174 F.2d 226 (D.C. Cir. 1948), which was subsequently overruled by this Court, 337 U.S. 265 (1949). See also American Broadcasting Co. v. FCC, 179 F.2d 437 (D.C. Cir. 1949).

B. *Adequacy of Procedure*

Not merely is the Commission's power to impose a temporary stay on CATV expansion firmly grounded in statute and precedent but it has been exercised through procedures both fair to respondents and adequate under the law.

Respondents had a timely opportunity to present their views to the Commission. The petition which commenced these proceedings was filed with the Commission on March 17, 1966. Respondents had an entire month to prepare oppositions and took full advantage of it; on April 18, 1966, the Mission group of respondents, n. 21 *supra*, filed a 28-page opposition together with forty pages of attachments containing charts, affidavits, and similar data. The fourth respondent, Southwestern Cable Co., submitted three substantive documents, a brief in opposition, a motion to dismiss and a statement of position, along with quantities of supporting material. Midwest's responsive papers followed promptly within the next 20 days.[62] This procedure is spelled out in the CATV rules, 47 C.F.R. § 74.1109 (1967), and affords important protections not allowed by the SEC in *Homan* and not found essential by the reviewing court in that case.

On July 20, 1966, the Commission adopted its memorandum opinion and order of almost 30 pages giving careful consideration to the contentions and arguments of each side. The opinion considers not only the factual contentions of all parties and its own controlling policies, but deals specifically with objections to temporary relief framed by the respondents. The order itself carefully reserves to respondents power to continue and expand carriage of San Diego area signals and to continue present carriage of Los Angeles signals and to expand within specified geographical areas containing "substantial numbers of potential new subscribers" (A. 171).

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[62]The assortment of pleadings require half a page of footnote space in the Commission's decision merely to catalogue (A. 147 n.1). All the papers are on file with the Clerk of this Court.

The Commission did not hold an evidentiary hearing, nor do its rules require one. 47 C.F.R. § 74.1109 (1967). The very aim of its procedure is to ascertain whether a full-scale hearing is warranted and whether interim relief is needed during its course. The appraisal on which permanent relief must turn demands a thorough inquiry into difficult and elusive problems, technical, economic, and even sociological in kind, and consideration of elaborate data (A. 58). The hearing process alone in the present case involved an enormous volume of exhibits and consumed 28 days of hearing and a great many hearing conferences over the course of eight months, although the case had been handled on an expedited basis. The briefing is currently underway for review by the Commission of its examiner's report and oral argument is still to come. As the Commission found in issuing its temporary stay, the public interest did not allow the dangers of CATV expansion to go unchecked during this interval.

Despite these compelling circumstances, respondents contended below that section 312(b) of the Act did not permit a temporary order to be issued without a hearing. 47 U.S.C. § 312(b) (1964). That section provides that the Commission may issue a cease-and-desist order against any person who violates the terms of his license, any provision of the Act or any regulation of the Commission. Under section 312(c), the procedure for issuing a cease-and-desist order includes service of a show cause order, thirty days' notice, a hearing and a statement of Commission findings and reasons served on the person involved if the order issues.[63] 47 U.S.C. § 312(c) (1964).

The short answer to respondents' argument is that section 312 was not violated because it did not apply. The Commission did not act under authority of that section but under sections 4(i) and 303(r), whose capacity to support the Com-

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[63] The hearing aside, respondents did in fact receive the substance of these requirements: notice, thirty days to respond, and an opinion.

mission order has already been demonstrated. Moreover, section 312(b) was not intended to apply here. Respondents held no license and have never been accused of violating any statute, rule, or license term, the only conditions in which a cease-and-desist order is authorized. Indeed, had the Commission's directive been issued under section 312(b), respondents could not have sought review in the Ninth Circuit. Review of cease-and-desist orders is confined to the District of Columbia Circuit under section 402(b) of the Communications Act, 47 U.S.C. § 402(b) (1964).

Nor does the Commission's order in this case offend the underlying policy or rationale of section 312 for that section contemplated an entirely different type of order addressed to an entirely different class of problems. A cease-and-desist order is a permanent decree properly issued after the question has been thrashed out completely and designed to terminate the controversy. The Commission's order here is merely an interim measure to assure that the public interest would not be frustrated pending a full hearing on what the public interest ultimately required.[64]

The very nature of the CATV rules makes it both ironic and pointless to insist that there should have been an evidentiary hearing before the Commission issued its order. As already noted, the Commission was urged when it was framing its CATV rules to impose a blanket ban on CATV expansion in situations like that below; indeed the Los Angeles-San Diego problem was a specific and prime example of the need for effective rules (A. 18-19, 48-50, 68-69). Had such a ban been promulgated, respondents would have

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[64] Thus, there is nothing to respondents' rhetorical complaint that they, who have broken no regulations, are denied the section 312 hearing accorded to a violator of the CATV rules. In the latter case the question is what the violator was doing; clear enough in the present case, and, except in the most unusual circumstances, the violator has no right to a hearing on whether the public interest requires the order, the essential question here and on which full opportunity for written submissions was allowed.

automatically been prevented from expanding the importation of Los Angeles stations without being afforded the right to make any written presentation, let alone any evidentiary hearing under section 312. Having secured less stringent limitations, respondents now claim to be entitled to greater rights. To require a hearing in cases such as this could well force the Commission to rewrite its rules to impose an automatic ban on expansion of existing systems until the public interest question is resolved.

What is more, it is difficult to imagine what function a hearing would have served given the substantive standards for granting the order at issue, standards that are not controlled by section 312 or its rationale. The Commission has made evident in the Second Report and Order and the opinion in this case its resolve to prevent serious CATV penetration into a major market at the risk of injury to UHF television until the Commission could "explore in depth the details" of the proposed CATV expansion, market studies, local television, pay-TV potential, and other important facets (A. 58).

The papers submitted to the Commission before it issued the order under review established beyond dispute that San Diego was a major market with considerable off-the-air local service, that it was a center of present and potential UHF activity, that respondents were transmitting Los Angeles signals and that their franchises and existing lines demarcated large areas for potential expansion. Claims of irreparable injury advanced by respondents were judged inadequate as a matter of law assuming the truth of the facts asserted (A. 167-69).[65] The boundaries of concentrated CATV service by respondents on the grandfather date, and the temporary limits for expanding carriage of Los Angeles signals were not sub-

[65] Nevertheless the order left it open for respondents to reapply at any time "if some form of irreparable injury not here shown or anticipated should develop . . ." (A. 169).

stantially challenged by respondents.[66] Consequently, the facts necessary to interim relief were basically undisputed and a further hearing on temporary relief would have served only to probe issues not controlling temporary relief but reserved for the evidentiary proceeding to decide on permanent limitations.

Oral presentations are not a requisite to temporary relief as a general matter. Any attempt to read *Standard Airlines* so broadly squarely conflicts with the same court's later decision in *Holman*, 299 F.2d at 127, and this Court's decision in *FCC* v. *WJR*, 337 U.S. 265 (1949), affirming that an oral hearing is not required even for a final order.[67] Given the need for prompt action by the Commission and the opportunity granted respondents to raise and document any contentions they wished, the procedures followed were correct and denied respondents no rights.

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[66] In the one geographic area where the parties differed as to boundaries, the Commission accepted respondents' position for purposes of the order, leaving it open to petitioners to pursue the matter with further proof if they wished (A. 170-71).

[67] See also Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-53 (1941); Inland Empire Council v. Millis, 325 U.S. 697, 710 (1945); American Broadcasting Co. v. FCC, 179 F.2d 437, 442 (D.C. Cir. 1949).

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

ERNEST W. JENNES
CHARLES A. MILLER
701 Union Trust Building
Washington, D.C. 20005

Attorneys for Petitioners

Midwest Television, Inc.
San Diego Telecasters, Inc.
Jack O. Gross

Of Counsel:

COVINGTON & BURLING
701 Union Trust Building
Washington, D. C. 20005

MILLER & SCHROEDER
1329 E Street, N.W.
Washington, D. C. 20004

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 363

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, *PETITIONERS*,

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP., *RESPONDENTS*.

NO. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC., AND JACK O. GROSS, *PETITIONERS*,

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV., INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP., *RESPONDENTS*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE ALL-CHANNEL TELEVISION SOCIETY AS AMICUS CURIAE

MICHAEL FINKELSTEIN
MARTIN E. FIRESTONE
1725 K Street, N. W.
Washington, D. C. 20006
Attorneys for Amicus Curiae

SCHARFELD, BECHHOEFER
& BARON
Of Counsel

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MOTION FOR LEAVE TO FILE A BRIEF FOR THE ALL-CHANNEL TELEVISION SOCIETY AS AMICUS CURIAE

The All-Channel Television Society (ACTS) moves for leave to file a brief as *amicus curiae* in these cases. The consent

of the attorneys for the petitioners in both cases has been granted. The consent of the attorneys for respondents has been requested but refused.

ACTS is a national association representing the interests of present and potential television broadcast stations which do or will operate on ultra high frequency (UHF) channels. The success, and in many cases the survival, of UHF stations is dependent upon the Federal Communications Commission's regulation of community antenna television (CATV). The FCC's power to undertake the regulation is the central issue in the present cases. Consequently, ACTS and its members have a critical interest in their outcome.[1]

To uphold the Commission's CATV regulations the Court must find that (1) CATV is within the scope of the Communications Act of 1934 and (2) the regulations adopted are authorized by that Act. The first finding depends on whether CATV systems are "persons engaged" in interstate "communication by wire or radio." Communications Act § 2(a), 47 U.S.C. § 152(a). It seems clear that CATV is embraced within this definition, but in any event ACTS does not propose to argue the point.

The second finding depends on whether the Commission's CATV rules are within the contemplation of its delegated powers to "establish areas or zones to be served by any station"; to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each"; and to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."

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[1] ACTS was formed in April, 1967, but did not begin to function effectively until June, 1967. For this reason ACTS did not seek to submit an *amicus* brief in the court below.

Communications Act of 1934, §§ 303(h), 303(r), 307(b), 47 U.S.C. §§ 303(h), 303(r), 307(b); see also *Id.*, § 4(i), 47 U.S.C. § 154(i). And whether the CATV rules are within the contemplation of these powers depends in turn on the impact of the regulated CATV activities on other matters concededly within the Commission's responsibility.

Petitioners in their briefs in the court below and in their certiorari papers have addressed this latter question but in the context of legal arguments showing that the CATV rules are within the contemplation of the powers delegated to the Commission by the statute. ACTS can contribute to the Court's resolution of the issues by focusing particularly on the impact of the regulated CATV activities on the television structure being fostered by the Commission under Congressional directives. In particular, it is in a position to show the impact of the regulated CATV activities on development of UHF broadcast stations. And this is of particular pertinence because the primary purpose of the Commission's CATV rules is to protect the public interest in the establishment and healthy maintenance of UHF broadcast services.

For these reasons ACTS believes that its *amicus* brief will aid the Court in the disposition of these cases and respectfully requests that leave to submit its brief be granted.

Respectfully submitted,

MICHAEL FINKELSTEIN

MARTIN E. FIRESTONE

1725 K Street, N.W.
Washington, D. C. 20006

Attorneys for The All-Channel Television Society

SCHARFELD, BECHHOEFER
& BARON
Of Counsel

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BRIEF FOR THE ALL-CHANNEL TELEVISION SOCIETY AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The All-Channel Television Society (ACTS) is a national association representing the interests of present and potential television broadcast stations which do or will operate on ultra high frequency (UHF) channels. The success, and in many cases, the survival of UHF stations is dependent upon the Federal Communications Commission's regulation of community antenna television (CATV). The FCC's power to undertake the regulation is the central issue in the present cases. Consequently, ACTS and its members have a critical interest in their outcome.

ARGUMENT

The questions presented by these cases—whether the Commission has authority to regulate CATV television signal carriage and whether its authority encompasses a temporary stay of CATV expansion pending a full Commission hearing on the consequences—must be resolved in the affirmative once two points are established: (1) CATV systems are engaged in "interstate communications by wire or radio" when they carry the signals of FCC-licensed television stations and (2) FCC regulation is necessary to foster a television system based on the maximum number of local television outlets (stations), which the FCC has been endeavoring to establish in furtherance of its statutory responsibilities to "establish areas or zones to be served by any station", and to "make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each."[1] The

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[1] Communications Act of 1934, §§ 303(h), 307(b); 47 U.S.C., §§303(h), 307(b).

Communications Act grants the Commission power to make rules and regulations as may be necessary to carry out its statutory responsibilities.[2]

ACTS does not propose to address the first point for presumably it will be dealt with adequately in petitioners' briefs. With regard to the second point ACTS will show that (1) in the exercise of its delegated powers the FCC, under Congressional guidance, has established the goal of a television broadcasting system based on a maximum number of television broadcast stations as outlets for local self-expression and as sources for maximum program diversity, an objective that can be achieved only by full use of the UHF portion of the broadcast spectrum, and (2) the Commission's CATV rules are vitally necessary to preserve the opportunity for full utilization of the UHF band, which would be gravely threatened by the unregulated expansion of CATV activities.

I. THE NATIONAL POLICY FAVORING DEVELOPMENT OF A TELEVISION SYSTEM BASED ON THE MAXIMUM NUMBER OF LOCAL TELEVISION STATIONS

The existing television structure of intermixed VHF and UHF stations dates back to 1952 when the Commission, following a lengthy rule-making proceeding, adopted its basic table of television channel assignments. Acting pursuant to the Congressional directive to effectuate a "fair, efficient, and equitable distribution of radio service" to each of the several states and communities (Communications Act of 1934, § 307(b), 47

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[2] Communications Act of 1934, §§4(i), 303(r); 47 U.S.C., §§154(i), 303(r).

U.S.C. § 307(b)), the Commission assigned television channels to over 1250 communities. It rejected the notion (popularly known as the DuMont plan) to assign most channels for use in the major cities which would house super-stations serving large regions, holding instead that "as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs." *Sixth Report and Order in Dockets 8736, et al.*, 17 Fed. Reg. 3905, 3912, 3913 (May 2, 1952).

In order to achieve the objective of maximizing local outlets and program diversity, the Commission assigned channels in the UHF band as well as those in the VHF band. However, in the succeeding years, development of stations in the UHF band was sporadic and many UHF stations failed. The principal problem was that most television receivers were not equipped to receive UHF broadcasts. Manufacturers were not induced to construct all-band receivers in large volume because the demand for sets capable of receiving UHF broadcasts was not sufficiently widespread. On the other hand, UHF stations could not develop and create a demand for their broadcasts until their signals could be received by a substantial number of people. To break this vicious circle the Congress, acting on the Commission's recommendation, enacted the All-Channel Receiver Law in 1962 (76 Stat. 150, 47 U.S.C. §§303(a), 330). Pursuant to this statute all television receivers manufactured after April 30, 1964, are required to be capable of UHF as well as VHF reception. As a consequence the increase in the percentage of homes in the country capable of receiving UHF broadcasts has been and will continue to be dramatic.[3]

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[3] The Census Bureau publishes statistics periodically that show that the percentage of homes in the country able to receive UHF broadcasts has increased from 22.8 percent in August 1965 to 33.8 percent in August 1966 to 42.1 percent by June 1967.

However, the Congress recognized that the results sought to be achieved by the All-Channel Receiver Law would not be reached overnight. It was imposing a long-range solution to a difficult problem and it recognized that it might be a number of years before the statute had its full effect and most of the homes in the country were able to receive UHF broadcasts. H. Rep. No. 1559, 87th Cong., 2d Sess., pp. 5, 6, 7.

The All-Channel Receiver Law constituted a Congressional reaffirmation of the policy enunciated in the Communications Act of 1934 and applied by the Commission in the *Sixth Report and Order* in 1952 that the broadcast system should be based on the maximum number of local outlets. Thus, the report of the House Committee on Interstate and Foreign Commerce stated that the goal is

> "a commercial television system which will (1) be truly competitive on a national scale by making provision for at least four commercial stations in all large centers of population; (2) provide at least three competitive facilities in all medium-sized communities; and (3) permit all communities of appreciable size to have at least one television station as an outlet for local self-expression."[4]

The Congressional and Commission objective of building the Nation's television system on the maximum number of local television broadcast outlets is soundly grounded in consideration of public policy. A television station within the community or neighboring area can provide a range of service impossible for distant stations. It furnishes accounts of news and events in

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[4] H. Rep. No. [illegible], 87th Cong., 2d Sess., p. 3.

the area and is heavily relied upon for this function.[5] It reports on political and governmental activity and provides a forum for public airing of local issues. In rural communities, agricultural information programs are standard fixtures.[6] Local stations afford local businessmen access to television advertising they can afford, which is particularly significant if their competitors are national concerns that advertise on television. A local station also is the source of local educational, religious, cultural and sports programs and is an outlet for local talent and local entertainment tastes.[7]

In an era of increasingly centralized communications of which newspaper mergers are merely one example, fostering of local television broadcast service is but one of several ways in which the FCC promotes diversification in public sources of opinion and entertainment. This Court has upheld the FCC in other manifestations of this objective. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (upholding rules limiting multiple ownership of stations); *National Broadcasting Co. v. United States*, 319 U.S. 190 (upholding regulations limiting network control of local station program responsibility).[8]

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[5] See Wood, Electronic Journalism 1-9; Roper, The Public's View of Television and Other Media, 1959-1964 (March 15, 1965).

[6] Over forty states have television stations regularly scheduling farm programs. Standard Rate & Data Service, Spot Television Rates and Data.

[7] The percentages of local programming devoted to various categories in March 1967 were as follows: News: 40.9 percent; Sports: 7.2 percent; Entertainment: 21.7 percent; Public Affairs: 7.9 percent; Religious: 6.9 percent; Agricultural: 5.1 percent; Instructional: 7.1 percent; Other: 3.2 percent. Television, Aug. 8, 1967, p. 36.

[8] Local stations are important employers. As of December 31, 1966, the 608 local commercial television stations employed over 39,000 persons. FCC Television and Broadcast Financial Data – 1966, Table 11.

The objective of maximum utilization of the broadcast spectrum for local television outlets can only be met through full use of the UHF portion of the broadcast band. In its report on the All-Channel Receiver legislation in 1962 the Senate Commerce Committee stated "the opportunity for local outlets which would be available for local programming and local self-expression is severely restricted in many of the markets because of the limited number of stations that are available. . ."[9] Similarly, the House report stated that the 12 VHF channels alone were "entirely inadequate for the Nation's needs" and that the development of UHF "is not only the best but the only practical way of achieving an adequate commercial and educational television system in the United States."[10]

Now that the All-Channel Receiver Law has taken effect and the principal obstacle to UHF development is being eroded (as more homes acquire sets equipped for UHF reception), UHF broadcasting is beginning to realize its potential. As of December 4, 1967, 135 UHF stations were in operation and 170 stations under construction but not yet on the air. Also, as of December 4, 1967, there were pending before the Commission an additional 96 UHF station applications.[11]

As the Commission stated in its *Second Report and Order* (A. 47), "there is every present indication that the all-channel set requirement is having its desired effect, with greatly increased interest in UHF, particularly in the many applications filed for

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[9] S. Rep. 1526, 87th Cong., 2d Sess., p. 4.

[10] H. Rep. 1559, 87th Cong., 2d Sess., pp. 4-5.

[11] Based upon Commission records, the number of UHF stations, both commercial and educational, on the air on January 1 is as follows: 1967 – 174; 1966 – 148; 1965 – 129; 1964 – 120; 1963 – 113.

the larger cities." If this momentum continues there is every reason to be optimistic that the Commission's objective of thousands of television stations, mostly UHF stations, in many hundreds of communities throughout the country can be achieved.

Full development of UHF is also necessary to achieve an effective nationwide educational television system. Most of the several hundred channels reserved for educational television are in the UHF band (see 47 CFR, § 73.606(b)) and, as the House Committee stated, educational television's "future and expansion will largely depend on the successful development of UHF broadcasting."[12]

In addition, full development of UHF commercial stations promises a widening of sources of national programs now largely supplied by three major national networks. One possibility is that successful establishment of UHF stations will lead to a "fourth national network or the formation of 'FM-type networks' in television." *Second Report and Order* (A. 46). These might include regional or specialized networks providing programming of interest to large regional areas or to minority groups, for example, that is not now available through national sources.

This brief sketch demonstrates the vital importance of UHF stations to the full achievement of our national television goals. It is because certain aspects of CATV profoundly threaten the achievement of these goals that the Commission has exercised its jurisdiction over CATV to regulate these activities. In the next section we turn to the Commission's regulations and show how they are designed to preserve the opportunity for UHF development.

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[12] H. Rep. 1559, 87th Cong., 2d Sess., p. 4.

II. THE COMMISSION'S REGULATION OF CATV IS VITAL TO THE SUCCESS OF UHF TELEVISION

We have shown that the statutory objective of a fair, efficient and equitable distribution of radio service to each of the several states and communities, which the Commission has construed, with Congressional approval, as requiring the maximum number of local television outlets, can only be met by full utilization of the UHF portion of the broadcast spectrum. To advance this objective the Commission, in the exercise of its delegated powers, including its powers to "establish areas or zones to be served by any station" and to "make such rules and regulations . . . as may be necessary to carry out the provisions of this Act" particularly Section 307(b) [13] has adopted regulations applicable to certain CATV activities. We show below that these regulations are indispensable to maintenance of the service areas of television stations established by the Commission and to achievement of the overall statutory objectives.

CATV is the use of complex electronic systems to gather television signals and feed them by wire into subscribing homes. CATV systems originated to provide television service to communities which, because of mountainous terrain or other obstacles, or because of their distance from television stations, were unable to receive television signals "off-the-air" through normal home reception devices. In this respect CATV has provided and continues to provide a valuable service to its subscribers supplementary to the basic off-the-air broadcast services available to the public at large.

In the past several years, however, a new CATV trend has developed that is quite distinct from the original CATV function.

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[13] 47 U.S.C. Section 307(b).

It involves the construction of multiple-channel systems in the larger cities and communities for the purpose of importing television signals from distant stations that do not and were not intended to serve the CATV community "off-the-air." Typically, the new CATV communities already enjoy substantial service from local stations and in many communities UHF stations have recently begun to operate or are preparing to commence operations. Thus, CATV systems are either already in operation or are planned for such metropolitan areas as Philadelphia, which has three UHF stations in operation and one UHF station planned for the future, Cleveland, which has two UHF stations under construction and applications pending for a third station and Washington, D.C., which has two UHF stations in operation and one planned for the future.

In its *Second Report and Order,* the Commission took note of "the changing nature of the CATV operation" (A. 47), pinpointing three developments: first, channel capacity of the systems has increased from an average of three in 1959 to twelve at the time of the report and twenty or more for the future; second, signals are being carried over greater distances—up to several hundred miles;[14] and "finally, the CATV industry has shifted its attention to the larger communities . . ." (A. 47-48).

This new CATV trend poses a great threat to the establishment and maintenance of local television stations, particularly UHF stations, the continued operation of which hangs in

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[14] CATV systems are becoming able to receive television signals originating great distances from the communities in which the systems operate through the use of sophisticated receiving antennae without the necessity of utilizing microwave facilities. These antennae devices cost up to $100,000 and, obviously, are not available to the general public.

delicate balance and which will continue to struggle for economic viability until the All-Channel Receiver Law[15] becomes fully effective.

The threat takes several forms. First, a CATV system can deprive a local station of access to its audience by not carrying it. Typically, home owners disconnect and sometimes remove altogether outside antennae when television sets are connected to CATV. *First Report and Order,* 38 FCC 683, 702, n. 25. Thus, if the CATV system fails to carry a local station, the local station is deprived of a fair opportunity to compete for an audience among the subscribers to the CATV system. And the inevitable reduction in the local station's audience causes a corresponding loss in the advertising revenues the station needs to survive, since it is an economic fact that the revenues of a television station are directly related to the audience the station obtains for its programs. To meet this threat, the FCC adopted "carriage" rules that require CATV systems to carry local stations and not to degrade their signals.

Second, CATV can dilute a local station's audience by carrying distant stations whose programs duplicate those of the local stations, thereby causing a reduction in the local station's audience through fractionalization. Such fractionalization is most apparent when a CATV system carries distant network affiliated stations which broadcast at the same time the same network programs broadcast by the local stations. The duplication does not, of course, extend the choice of programs available to the CATV system subscribers; it merely permits the subscribers to view the same programs on several different channels rather than only on the channel on which the local station broadcasts.

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[15] 47 U.S.C. 330.

For example, there are 33 operating CATV systems in the Wilkes-Barre–Scranton, Pennsylvania area which serve a total of 95,447 homes. All of these systems carry the NBC network programs broadcast by UHF Station, WBRE-TV which is licensed to serve the Wilkes-Barre–Scranton area, but almost all the systems also carry the NBC network programming broadcast at the same time by VHF Station KYW-TV, Philadelphia, which is located from 75 to 100 miles from the great majority of the CATV systems. Absent carriage on the CATV systems, the programs of Station KYW-TV would not be received by the vast majority of the CATV systems' subscribers, because of the distance from Philadelphia and the nature of the terrain in the area. But because of the carriage by the CATV systems of the NBC network programs broadcast by Station KYW-TV, the audience among the systems' subscribers for NBC programs is divided between Station WBRE-TV and KYW-TV. As a consequence, at least one national audience rating service has reported that in three counties outside the KYW-TV normal service area and well within the WBRE-TV service area, KYW-TV is viewed more than Station WBRE-TV. As a matter of fact, because of the KYW-TV audience among the CATV subscribers in those three counties, the rating service considers the counties to be a part of the Philadelphia television market rather than Wilkes-Barre–Scranton television market. The loss of these counties to the Philadelphia television market directly results in a loss of revenues to Station WBRE-TV since advertisers desiring exposure in the three counties in question will place their announcements on Station KYW-TV and not Station WBRE-TV.

To meet the second threat to the establishment and healthy maintenance of local television stations, the Commission requires that CATV systems, upon request by the local station, not duplicate any programs on the same day of broadcast by the local station.

Third, the carriage of numerous distant stations fragments the audience of the local stations, notwithstanding the operation of the non-duplication rule. Since that rule applies only to programs duplicated on the same day as their broadcast by the local stations, it does not cover most, if not all, the non-network programming of the distant stations carried on the CATV systems—a substantial percentage of the total number of programs broadcast by distant stations affiliated with one of the three national networks and practically all the programs broadcast by "independent" stations. Oftentimes, and particularly where the CATV system carries stations from a larger city, these programs consist of movies and syndicated films that will also be broadcast by the local stations at a later date.[16] But since the programs are carried on the CATV system first, the local stations obtain a smaller audience for them, since every showing of a program reduces its audience potential for subsequent showings. And the audience diminution resulting from the prior showing of the programs on the CATV system can in turn prevent the local stations from deriving sufficient advertising revenue to cover the cost of the programs.[17]

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[16] The distributors of television program fare establish the price of the programs according to the size of the market being served by the television station to which the program is offered. The larger the market, the higher the price of the program. Thus, as a matter of good business judgment, the distributors of television programming first offer their products to the television stations in the largest markets such as Los Angeles and New York City. This process invariably results in the better syndicated programs and feature films being purchased and first broadcast by television stations in the larger cities.

[17] One particularly significant ancillary fact is that the revenue from non-local programs generally helps to sustain the local programming efforts of television stations, for local programming is often the most expensive to produce but has a narrower audience and, consequently, advertiser appeal.

The effects of prior CATV showing of the programs of a local station are, of course, most severe where the local station is not affiliated with one of the national networks, since such a station must rely almost entirely on syndicated and feature films for the revenues necessary to sustain its operations. Significantly, most "independent" stations now on the air and coming on the air are UHF.

Even where the programs of local stations are not directly duplicated the carriage of distant stations on a CATV system results in the dilution of a local station's audience since the local station is not only competing for audience with the other stations allocated to the community, but is also competing against however many distant stations the CATV system may choose to carry. In the absence of federal regulation, the CATV system's choice of the number of distant stations to be carried is typically dictated not by any considerations relating to the "fair, efficient, and equitable distribution" of television services,[18] but rather only by the limitations of CATV technology and the CATV system's private business concerns.

Independent stations, and particularly independent UHF stations, are the most vulnerable to the audience fragmentation caused by CATV for they have only a limited potential audience to start with. Almost without exception, during periods when the national networks are providing programs, the independents are able to attract only a relatively small percentage of viewers that are not interested in the programs of the national networks. And when a CATV system carries other independents from distant cities the local independent station's limited audience is further reduced and could be reduced below the minimum required for the station to continue operation. As the Commission found in its *Second Report and Order:*

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[18] 47 U.S.C. 307(b).

> ". . . The audience for non-network stations is limited (about a 10 percent share in most markets in the prime time) and this limited audience might be greatly reduced since very substantial numbers of people interested in viewing the non-network programming would be watching the distant independents (*e.g.*, those of New York or Los Angeles). We think this follows as a matter of common sense, since these established big city VHF independents certainly have the ability to bid for and acquire the expensive, attractive non-network programming." (A. 50)

The fragmentation threat to independent UHF stations is most immediate and could result in the demise of many of the stations now on the air, as well as the prevention of others from coming on the air. Many independent UHF stations have come on the air in the last few years and are struggling to attain commercial viability.[19] They are investing huge sums of money in equipment and programming, including local programming oriented to the particular program interests of their communities, and they have sustained substantial losses during this formative period. Widespread CATV importation of distant stations that would fragment the audiences of these new and young independent stations would certainly compound these losses and ultimately cripple or destroy most of them.

Thus, in Charlotte, North Carolina, more than one million dollars was invested in an independent UHF station, WCTU-TV, which went on the air in July, 1967. At that time, there was no CATV system in operation in the City of Charlotte and the CATV systems in operation elsewhere within the WCTU-TV service area did not carry other independent stations. Since

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[19] As shown at n. 3, *supra*, a substantial percentage of all television sets in use are still incapable of receiving UHF stations.

going on the air, WCTU-TV has been struggling to attain economic viability, as was expected. But it was also expected that the station ultimately could become viable since the share of the total television audience usually obtained by independent stations should be sufficient to attract the advertising support necessary to sustain the station's operations. However, if the CATV systems in operation throughout the station's service area—and this now includes a CATV system in the City of Charlotte itself—were to carry other independent stations, WCTU-TV's prospects for attaining economic viability would be doubtful at best since WCTU-TV would then have to obtain the revenues necessary to sustain its operation on the basis of a share of an already small share of the total television audience in the Charlotte market.[20]

The potential for harm in unrestricted CATV importation of signals is also graphically illustrated in a situation now developing in Philadelphia, Pennsylvania. Philadelphia presently is served by three network affiliated VHF television stations and three independent non-network affiliated UHF stations. Additionally, authorization for the construction of a fourth independent UHF television station in the market has been issued by the Commission.

The independent UHF stations now operating in the market have been on the air for over two years. The operation of the All-Channel Law, accelerated by the presence of the stations in the market, has resulted in the conversion of some 70% of the Philadelphia market to all-channel reception capability. Within recent months, the stations have evidenced strong audience acceptance in the market and indications of eventual economic viability and a healthy economic future.

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[20] Non-commercial educational television stations, most of which are or will be UHF stations, are also endangered by CATV extension of distant signals though in different ways. These stations do not sell advertising but rely very heavily upon local contributions and grants for operating revenues. These sources are likely to dry up should CATV import non-commercial stations from other cities. While the distant station normally cannot serve local needs, by tying directly into a school program for example, it would be extremely difficult to maintain local financial support for an educational station in the face of the availability of distant educational stations on the cable.

However, presently pending before the Commission are 30 proposals to import into the Philadelphia television market the signals of the three New York City independent VHF television stations which could result in the three New York City independent stations being brought into over 120 communities within the television market served by the Philadelphia independent UHF stations, including the City of Philadelphia. The impact of such massive importation of distant city independent signals upon the UHF stations in Philadelphia, particularly at this critical juncture in their development, will adversely and irreparably damage the development of effective independent local television service in the Philadelphia area.[21]

As a partial solution to the threat of independent UHF station development from the carriage of distant stations on CATV systems, the Commission adopted a regulation[22] requiring prior Commission authorization before any distant station is carried on a CATV system operated within the primary ("Grade A") service areas of stations in the 100 largest television markets. In view of the substantial threat to local broadcast service posed by CATV carriage of distant stations, the FCC's moderate regulations on the subject were clearly reasonable. Several parties urged the Commission to ban outright any CATV extension of television signals beyond their designated service areas.[23] The Commission's response was far less restrictive. It contained no outright bans. In the top 100 television markets it provided for evidentiary hearings on request of CATV systems to determine whether importation of distant signals to communities within the Grade A service areas of local stations was in the public

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[21] If the development and healthy maintenance of independent UHF television service can be threatened in Philadelphia, the fourth largest television market in the country, the threat to independent UHF service by CATV carriage of distant stations in the smaller markets is obviously more pronounced.

[22] 47 CFR 74.1107.

[23] For example, ACTS has urged the Commission to require an evidentiary hearing before the carriage on a CATV system of any distant television station, regardless of the size of the market in which the CATV system operates.

interest, such importation to be deferred pending the Commission's determination. In the outer portions of local stations' service areas in the top 100 markets, and anywhere in the remaining markets, CATV systems were free to import distant stations unless by special petition it was shown to the FCC that such importation posed a substantial threat to establishment and maintenance of off-the-air service, in which case the Commission reserved the power to stay the CATV importation until it could determine the public interest questions. Similarly, "grandfathered" systems (those in operation when the rules were adopted) were permitted to continue their carriage of distant stations but should they attempt to expand operations to new areas the Commission, on special petition of an interested party, reserved the right to consider the matter and to stay the expansion while doing so.

In certain cases, stays are automatic under the Rules. In others they are granted on an *ad hoc* basis. Either way, they are central to the regulatory scheme, for, if a CATV system is permitted to expand its service area or add new stations while the public interest questions presented by such CATV expansion are being considered in a lengthy administrative proceeding, the adverse consequences the proceeding is designed to prevent may well take place before the proceeding is completed. Moreover, where UHF stations are planned but not yet in operation, unchecked CATV expansion could deter, if not totally preclude, the inauguration of local service.

In sum, the Commission has properly found that the development and healthy maintenance of independent UHF television service would further the Congressional mandate that the Commission provide a "fair, efficient, and equitable distribution" of television service throughout the country.[24] Independent UHF television stations in the vast majority of areas in the country do and will provide an alternative to network programming—which constitutes more than 60% of the programming of network-affiliated television stations—thereby making a substantial

[24] 47 U.S.C. 307(b).

contribution to the diversity of free television programming available to the public at large. Unregulated CATV operations, through the failure to carry the programs of local UHF stations, through the duplication of the local stations' programs and through the fractionalization of the local stations' audience by the carriage of multiple distant stations, pose a substantial threat to the Commission's goal and to the public interest.

In light of the Commission's delegated power to make rules defining "areas or zones to be served by any station," its obligation to so license stations as to provide a "fair, efficient and equitable distribution of radio services" to the states and their communities, and its power to make rules and regulations "necessary to carry out the provisions of this Act," the CATV rules here challenged by respondents seem not only consistent with but virtually compelled by the governing statutory authorizations.

A final word about the public interest consequences of destruction or impairment of local stations—particularly UHF stations, which would almost certainly follow if CATV were not regulated. CATV is a supplementary rather than primary television service for several important reasons. First, whereas off-the-air service is free to the public, the use of CATV requires payment of continuing monthly charges and often an installation fee, varying considerably from place to place but sometimes quite substantial.[25] Millions of Americans who now are served by free television simply cannot afford CATV or would have great difficulty in financing it. Thus, for these people destruction or impairment of off-the-air service means the demise or reduction of the only television service available to them.

Second, "because of the prohibitive costs of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals." *First Report and Order*, 38 FCC 683, 699. These are the outlying

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[25] Seiden, Economic Analysis of CATV Systems and the Television Broadcasting Industry, p. 27, calculated that "the average CATV subscriber pays $60 a year for CATV service, often in addition to an initial installation charge."

areas, particularly rural areas, and if local service ceases or its quality is diminished by virtue of CATV distant station importation into the heavily populated areas, the people in these outlying areas would have nothing to replace their lost service. Often in these areas because of their isolation television is the only or principal source of entertainment and news.

The next few years will be decisive for UHF broadcasting. As the FCC stated, "we are at the watershed in the development of UHF broadcasting" and with the "increased ferment in UHF, we believe the next few years will supply the critical answer to whether the Congressional goal of a truly nationwide television system employing both UHF and VHF on an effective intermixed basis will be achieved." (A. 46, 47.) The Commission's Rules regulating CATV are an effort to prevent CATV from thwarting that goal and, as such, they are in the main stream of its statutory responsibilities.

CONCLUSION

For the foregoing reasons *Amicus Curiae* respectfully submits that the FCC's CATV rules are within its statutory power and that the contrary holding of the Court below should be reversed.

Respectfully submitted,

MICHAEL FINKELSTEIN

MARTIN E. FIRESTONE

1725 K Street, N.W.
Washington, D. C. 20006

Attorneys for Amicus Curiae

SCHARFELD, BECHHOEFER
& BARON
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1967

NO. 363

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, *PETITIONERS,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP., *RESPONDENTS.*

NO. 428.

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC.,
AND JACK O. GROSS, *PETITIONERS,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC
VIDEO CABLE CO. AND TRANS-VIDEO CORP., *RESPONDENTS.*

On Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF FOR THE ALL-CHANNEL TELEVISION SOCIETY AS AMICUS CURIAE

Of Counsel:

WILNER, SCHEINER & GREELEY
Landmark Building
1343 H Street, N.W.
Washington, D.C. 20005

FLETCHER, HEALD, ROWELL,
KENEHAN & HILDRETH
1023 Munsey Building
Washington, D.C. 20004

ARTHUR SCHEINER
Counsel for Respondent
Southwestern Cable Co.

ROBERT L. HEALD
Counsel for Respondents
Mission Cable TV, Inc.
Pacific Video Cable Co.
and Trans-Video Corp.

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Southwestern Cable Co., Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp., Respondents in Cases No. 363 and 428, hereby object to the Motion of The All-Channel Television Society (ACTS) for leave to file an *amicus curiae* brief in these cases and respectfully request that it be

denied. As ACTS correctly states in its Motion (p. ii), Respondents have refused ACTS' request for consent to file such a brief.

REASONS FOR WITHHOLDING CONSENT

Respondents do not believe that ACTS will submit an *amicus curiae* brief addressed to any question presented by these cases.[1] The only questions before this Court are the following: First, whether the Federal Communications Commission possesses authority under the Communications Act of 1934, as amended, to regulate operations of community antenna television (CATV) systems; second, whether such authority, if possessed, encompasses the power to issue a temporary stay order maintaining the *status quo* pending an evidentiary hearing to determine the impact on local television stations from the distribution of television signals by a CATV system. In the ACTS motion the dimensions of these cases are ignored; the Court is not here faced, as ACTS claims, with a question of upholding ". . . the Commission's CATV *regulations* . . ." and it will not be required to find that ". . . the *regulations* adopted are [or are not] authorized by [the Communications Act of 1934]." (Motion, p. ii, emphasis supplied). ACTS disclaims any intention to brief the question of Commission jurisdiction, or the question of the Commission's authority to issue a temporary stay, but proposes instead to brief a new question it has raised – whether ". . . the regulations adopted are authorized by that Act." The "regulations

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[1] ACTS has in fact filed its brief in a single bound volume with its motion for leave to file. Respondents do not believe it would be proper to consider the brief in ruling on the motion, and will not refer to the content herein.

adopted" are many and complex and, with the single exception of the questioned power to issue an interim order in the nature of a stay, are not involved in these cases, and were not before the Court of Appeals for the Ninth Circuit.

ACTS claims that it ". . . can contribute to the Court's resolution of the issues by focusing particularly on the impact of the regulated CATV activities on the television structure being fostered by the Commission . . ." and that ". . . it is in a position to show the impact of the regulated CATV activities on development of UHF broadcast stations . . . ." (Motion, p. iii) necessarily comprehend arguments, not only irrelevant to the two questions presented, but based on material not of record in these cases.

ACTS' implicit admission that it wishes to try a factual matter before this Court would alone make its Motion objectionable. What is even more objectionable, however, is that the questions presented to this Court do not even arise from the factual dispute ACTS wishes this Court to try. Indeed, the second question actually before the Court can be restated: To inquire whether the Commission has the power to maintain the *status quo* while holding an evidentiary hearing to determine whether the evidence which ACTS assumes exists does, in fact, exist.

The ACTS Motion does not allege that there are facts of record or questions of law within the dimensions of the questions presented which will not be presented or will be inadequately presented by the Petitioners. Moreover, the ACTS Motion does not allege that there is a question of law which has not been presented and which is relevant to the dispostion of these cases.[2] The Motion very simply misstates the

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[2] ACTS has not shown that it, as an organization, or any of its individual members, are interested in any other case or administrative

(continued)

questions presented and then indicates a desire to argue facts not of record and not provable without a full evidentiary hearing.

Thus, the Motion for Leave to file an *Amicus Curiae* brief submitted by ACTS fails to comply with Rule 42.3 of the Court and should be denied.

Respectfully submitted,

ARTHUR SCHEINER
Counsel for Respondent Southwestern Cable Co.

ROBERT L. HEALD
Counsel for Respondents Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp.

Of Counsel:

WILNER, SCHEINER & GREELEY
Landmark Building
1343 H Street, N. W.
Washington, D. C. 20005

FLETCHER, HEALD, ROWELL,
KENEHAN & HILDRETH
1023 Munsey Building
Washington, D. C. 20004

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2 (continued)
hearing which will be affected by the decision on the questions presented in this case. Furthermore, even if ACTS or its members would be affected by the decision on the Commission's jurisdiction, which ACTS views as the ". . . central issue. . ." in these cases (Motion, p. ii), it has specifically disavowed any intention to brief that point, as noted above. Inasmuch as Petitioners and ACTS appear to have viewpoints which coincide, and Petitioners are represented by competent counsel, leave to file should be denied. *Northern Securities Company v. United States*, 191 U.S. 555, 48 L.Ed. 299 (1903).

SUPREME COURT, U. S.
FEB 2 1968
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 363

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC. and JACK O. GROSS, Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC. PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR ALICE CABLE TELEVISION CORPORATION and BUCKEYE CABLEVISION, INC.

AMICI CURIAE

THOMAS W. WILSON
JOHN D. MATTHEWS
CHARLES H. HELEIN
600 Munsey Building
Washington, D.C. 20004
Attorneys for Alice Cable Television Corporation, Amicus Curiae

ROBERT A. MARMET
PETER L. KOFF
1822 Jefferson Place, N.W.
Washington, D.C. 20036
Attorneys for Buckeye Cablevision, Inc., Amicus Curiae

Of Counsel for Alice Cable Television Corporation
ROBERT H. YOUNG
Morgan, Lewis & Bockius
2107 Fidelity-Philadelphia Trust Building
Philadelphia, Pennsylvania 19109

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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In the

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR ALICE CABLE TELEVISION CORPORATION and BUCKEYE CABLEVISION, INC.

AMICI CURIAE

OPINIONS BELOW

The opinion of the Court of Appeals (A. 184-193)* is reported at 378 F.2d 118. The Federal Communications Commission's Memorandum Opinion and Order (A. 146-179) is reported at 4 FCC 2d 612.

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*"A" refers to the printed appendix filed in this Court under Rule 36(1).

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1967 (A. 194). A petition for a writ of certiorari was filed by the United States on July 13, 1967 (Case No. 363) and by Midwest Television *et al.* (Case No. 428) on July 27, 1967. Certiorari was granted in both cases on October 23, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1964) and 28 U.S.C. § 2350 (1966 Supp.).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has jurisdiction to regulate non-microwave community antenna television (CATV) systems.

2. If it has, whether in the exercise of such jurisdiction the Commission has power to issue an interim order maintaining the status quo pending a hearing to determine the impact on local broadcast television of distribution by a CATV system of television signals from other areas of the country.

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(e), 4(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152(a), 153(a), 153(e), 154(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b), are set forth in the Appendix to Petitioner FCC's Brief pp. 57-61.

INTEREST OF AMICI CURIAE

Alice Cable Television Corporation (hereinafter "Alice Cable") operates a community antenna television (CATV) system[1] in the City of Alice, Texas, pursuant to a franchise

[1] A community antenna television system consists of a master television receiving antenna ("head-end" location), usually erected on a mountain, hill or other high elevation to receive the signals of the de-

issued by the City of Alice. Operations of the CATV system were commenced on August 24, 1963, and the system delivers to its subscribers the signals of television stations KIII, KRIS-TV and KZTV, Corpus Christi, Texas, and KENS-TV, KONO-TV and WOAI-TV, San Antonio, Texas, all of which are obtained off-the-air by Alice Cable by means of a tall antenna structure.

Buckeye Cablevision, Inc. (hereinafter "Buckeye") owns and operates a CATV system in Toledo, Ohio, pursuant to a franchise issued by the City. Buckeye delivers to its subscribers the signals of television stations WTOL-TV, WSPD-TV, WDHO-TV and WGTE-TV, Toldeo; WBGU-TV, Bolling Green, Ohio; WTVS, WWJ-TV, WKBD-TV, WXYZ-TV and WJBK-TV, Detroit, Michigan; and CKLW-TV, Windsor-Detroit, all of which are obtained off-the-air by Buckeye by means of an antenna structure.

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sired television broadcast stations in the necessary strength for good quality pictures, together with a coaxial cable distribution system leading from the "head-end" antenna throughout the community to the homes of individual subscribers, who are usually obliged to pay an initial connection fee and fixed monthly charge for the service. Initially, CATV systems were established generally in areas where, because of terrain and other topographic or geographic conditions, receiption of television signals by means of the ordinary home roof-top receiving antenna was non-existent or of unsatisfactory quality. However, recently CATV systems have been installed in areas where one or more local television stations are located. The function of the CATV system in the latter case is to improve the quality of existing television signals by eliminating interference, "ghosting" and the like, and to furnish a number of additional television signals and program choices from more distant stations, not available by means of roof-top antenna pickup. Today, approximately 1765 CATV systems serve approximately 3,000,000 households and 9,900,000 persons constituting approximately 5.3 percent of the total estimated United States households with television receivers.

Neither Alice Cable nor Buckeye utilize any radio relay microwave facilities in connection with the operation of their respective CATV systems. All television signals delivered to subscribers of Alice Cable and Buckeye (Amici) are obtained off-the-air, and no portion of the radio frequency spectrum is utilized in connection with the operation of their CATV systems.

On March 17, 1966, the Federal Communications Commission (Commission) asserted jurisdiction over the CATV industry by publishing in the Federal Register Rules and Regulations applying to all CATV systems, including Amici's. The Commission's rule making action was entitled the Second Report and Order in Dockets 14895, 15233 and 15971. (A. 1) The basis for the Commission's asserted authority was stated to be essentially found in Sections 2(a), 3(a), 4 (i), 303(f) and (r) and 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 153(a), 154 (i), 303(f), 303(r) and 307(b) (1964). The new Rules require all CATV systems, upon request, to carry the signals of all "local" television stations (those stations of Grade B strength or better) without material degradation in quality; and to refrain from duplicating any programs broadcast by such stations at any time during the same day of their broadcast by any such stations where one station's signal is of a higher priority than any other station's signal. The Rules also require Amici to comply with certain procedures concerning the addition of any new television signals to their CATV systems; require the filing of certain information; provide for procedures designed to obstruct and impede Amici's expansion of their systems' operations; and impose other limitations upon Amici and other similar CATV systems which do not use the radio frequency spectrum.

Amici hereby adopt the Statements of the Case set forth in the Briefs of Respondents, Mission Cable TV, Inc., Pacific Video Cable Co., Trans-Video Corp., and Southwestern

Cable Co., in Case Nos. 363 and 428, and therefore do not repeat herein in detail the history of the Commission's CATV regulation. In summary, however, the history of the Commission's circuitous and contradictory actions in asserting jurisdiction over CATV systems involves disclaimers by the Commission of jurisdiction over CATV systems,[2] repeated failures by the Commission to obtain Congressional action conferring jurisdiction upon it,[3] and finally adoption of the CATV Rules in the Second Report and Order without regard for traditional and required procedures.

The Commission's action in adopting the Second Report and Order has therefore adversely affected and aggrieved Amici as it did Respondents and all other owners and operators of CATV systems. Amici perfected appeals to the respective United States Court of Appeals in the Circuits in which Amici reside and have their principal places of business, challenging the jurisdiction of the Commission to issue its CATV Rules. Subsequently, Alice Cable's appeal to the Fifth Circuit Court of Appeals and Buckeye's appeal to the Sxith Circuit Court of Appeals were transferred pursuant to 28

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[2] *In re Notice of Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite Stations", and TV "Repeaters" on the Orderly Development of Television Broadcasting,* Report and Order, Docket No. 12443, 24 Fed. Reg. 3004, 26 FCC 403, 18 Pike & Fischer, R.R. 1573, at 1599, 1600 and 1603 (1959).

[3] See *e.g.*, S. 2653, 86th Cong., 1st Sess. (1959), and a related report, S. Rep. No. 923, 86th Cong., 1st Sess. (1959). This Bill was defeated in the Senate. See 106 Cong. Rec. 9674 (1960). Subsequent attempts by the Commission to obtain jurisdictional legislation were unsuccessful in 1961 and as late as 1966, the Bills dying in Committee. See S. 1044, H.R. 6840, 87th Cong., 1st Sess. (1961), and H.R. 13286, 89th Cong., 2d Sess. (1966) and the accompanying Report H.Rep. No. 1635, 89th Cong., 2d Sess. (1966). See also, Appendix A of the Brief of Respondent, Southwestern Cable, "Legislative History of Attempts to Obtain CATV Legislation".

U.S.C. § 2112(a) to the United States Court of Appeals for the Eighth Circuit, Case No(s). 18793 and 18813, respectively, and now await decision by that Court.

Amici recognize that a question is presented for decision by this Court regarding the Commission's basic jurisdiction over non-microwave CATV systems. Amici further concede that the question presents problems of far-reaching importance. But, as parties to the several cases now pending in the Eighth Circuit, Alice Cable and Buckeye, must respectfully submit that the decision of the Ninth Circuit is not the proper vehicle for presenting those questions to this Court, since the grounds of that Court's decision are too narrow to present for decision herein all of the pertinent questions of law.

In addition to Amici, there are three other cases pending before the Eighth Circuit challenging the Commission's jurisdiction over CATV. Both national trade associations, the National Community Television Association, Inc., and the National Association of Broadcasters, are Intervenors in that Court. The significant constitutional questions involved in the Commission jurisdictional attempt, including the First and Fifth Amendments, were not considered or ruled upon by the Court below, but were fully briefed and argued by Amici and the other parties before the Eighth Circuit. Additionally, all of the specific CATV regulations and the asserted deficiencies therein, including serious violations of the Administrative Procedure Act, were extensively briefed and argued before the Eighth Circuit. These questions are not before this Court. We agree that this Court should ultimately decide the question of the Commission's jurisdiction over CATV. But, Amici respectfully submit that a meaningful decision must encompass the many subsidiary questions involved, including the Commission's manner and method of implementing the asserted jurisdiction. For these reasons, Amici respectfully suggest that the Court affirm the lower Court's narrow holding on the lack of authority to issue the interim order involved herein.

Recognizing the possibility of the Court's reaching the much broader question of jurisdiction, Amici sought and obtained the consent of counsel for the parties to these cases to submit this Brief *Amicus Curiae* on the question of the Commission's jurisdiction.

Continued enforcement of the CATV Rules constitutes, in our view, an illegal and unjustified extention of governmental power over a legitimate industry providing a necessary and sought-after service to the public. However, our concern extends beyond the interests of the particular parties to this litigation and beyond our own interest in conducting our businesses free from enervating Federal regulation. We believe the principle that Federal administrative agencies established by Congressional enactment as authorities with limited jurisdiction is impaired if any agency may, by its own administrative fiat, extend its powers without Congressional sanction to the limit of Congress' own power to regulate in a particular field; and that such disregard for this principle sets a dangerous precedent detrimental to the proper balancing and effective functioning of the vast powers of the Federal government contrary to the public interest.

SUMMARY OF ARGUMENT

I

The Federal Communications Commission Lacks Jurisdiction To Regulate Non-Microwave CATV Systems

A. The Federal Communications Commission was established by Congress by the enactment of the Communications Act of 1934, 48 Stat. 1064 *et seq.*, 47 U.S.C. § 151 *et seq.* As with all administrative agencies created by Congress, the Commission has carefully prescribed and limited jurisdiction. *Civil Aeronautics Board v. Delta Airlines, Inc.*, 367 U.S. 316 (1961); *Regents v. Carroll*, 338 U.S. 586 (1950); *Trans-Pacific Freight Conf. v. Federal Maritime Board*, 302 F.2d 875

(D.C. Cir. 1962); *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949). This jurisdiction may not be broadened or extended by administrative fiat without specific Congressional authorization to the limits of Congress' own power to regulate in a particular field. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607 (1944).

B. The legislative history and the plain language and structure of the Communications Act of 1934 negate the Commission's assertion of jurisdiction over non-microwave, non federally licensed CATV systems. Communications Act of 1934, 48 Stat. 1064, *et seq.*, 47 U.S.C. § 151 *et seq.*; *Regents v. Carroll*, 338 U.S. 586 (1950); *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284 (1954).

C. The implied or general powers of federal administrative agencies to regulate areas of aligned activities which affect the regulatory scheme of an agency repose no power in an agency to expand its jurisdiction to wholly distinct and heretofore unregulated enterprises. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).

D. The decision in *Buckeye* is in error and should not be followed by the Court. *Regents v. Carroll*, 338 U.S. 586 (1950); *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284 (1954).

II

The Commission Lacks the Statutory Power To Issue an Interim Order Maintaining the Status Quo Pending a Hearing To Determine the Impact on Local Broadcast Television of Distribution by a CATV System of Television Signals from Other Areas of the Country.

Civil Aeronautics Board v. Delta Airlines, 367 U.S. 316 (1961); *Trans-Pacific Freight Conf. v. Federal Maritime Board*, 302 F.2d 875 (D.C. Cir. 1962).

ARGUMENT

I

THE FEDERAL COMMUNICATIONS COMMISSION LACKS JURISDICTION TO REGULATE NON-MICROWAVE CATV SYSTEMS

A. The Federal Communications Commission was established by Congress by the enactment of the Communications Act of 1934, and as with all administrative agencies created by Congress, the Commission has carefully prescribed and limited jurisdiction.

The Federal Communications Commission was established by the Communications Act of 1934, 48 Stat. 1064 *et seq.*, 47 U.S.C. § 151 *et seq.*, to regulate communications in the United States "in the public interest, convenience and necessity." *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943). As with all administrative agencies created by Congress, the Commission has carefully prescribed and limited jurisdiction, which must be measured by and derives solely from the statute which grants and limits its powers. The Commission is powerless to confer jurisdiction on itself. *Civil Aeronautics Board v. Delta Airlines, Inc.*, 367 U.S. 316 (1961); *Regents v. Carroll*, 338 U.S. 586 (1950); *Trans-Pacific Freight Conf. v. Federal Maritime Board*, 302 F.2d 875 (D.C. Cir. 1962); *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).

This Court has so stated in *Addison v. Holly Hill Fruit Products* as follows:

> "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested.
>
> * * *

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory *legislation. But it is no warrant for extending a statute that experience may disclose . . . should have been made more comprehensive.*" (322 U.S. 607, 616-617 (1944).) (Emphasis supplied.)

It is within the above framework that this Court must consider the validity of the Commission's action asserting jurisdiction over the CATV industry. This case calls for a determination of whether within the four corners of the Communications Act can be found the jurisdiction over CATV which the Commission asserts. Absent such a finding, the Commission may not extend its jurisdiction by its own administrative fiat to the limits of Congress' power to regulate in the field of communications.

B. The legislative history and the plain language and structure of the Communications Act of 1934 negate the Commission's assertion of jurisdiction over non-microwave, non-licensee CATV systems.

The Commission finds its jurisdiction over CATV systems in Title III of the Communications Act, arguing essentially (a) CATV systems are engaged in interstate "communication by wire" under Section 3(a), 47 U.S.C. § 153(a); (b) that Section 2, 47 U.S.C. § 152 makes the Act applicable to "all interstate communications by wire or radio . . . and to all persons engaged within the United States in such communication. . . ."; (c) that therefore, the Commission may utilize its Rule Making powers under Sections 4(i), 47 U.S.C. § 154(i); 303(f) and (r), 47 U.S.C. §§ 303(f) and 303(r) to regulate CATV so that it will not frustrate the purposes of Sections 303(h), 47 U.S.C. § 303(h) and 307(b), 47 U.S.C. § 307(b). The Commission's reasoning constitutes an intellectual bootstrapping attempt to reach a distorted extension of its own authority contrary to the Act's basic structure and is completely at odds with the clear purpose of the Congressional mandate as set forth in the legislative history.

The legislative history of the Communications Act clearly establishes that its primary purpose was to provide for the regulation of interstate radio and wire common carriers (Title II) and for the licensing of radio stations (Title III) by the same agency. Previously these two separate and distinct functions had been under the jurisdiction of the Interstate Commerce Commission (insofar as communications related to common carrier activities by telegraph, telephone and cable companies) and the Federal Radio Commission (which dealt with the licensing of radio stations). Both the Senate and House Reports with respect to the Act make it clear that no major substantive changes were made in either the Interstate Commerce Act, as amended, 80 Stat. 168, 49 U.S.C. § 1 *et seq.* (1966) or the Federal Radio Act, 44 Stat. 1162, 47 U.S.C. § 281, *et seq.* (1927).[4] Thus, the Commission has two distinct functions only: authority under Title II of the Act over common carriers engaged in interstate and foreign communications by wire or radio, *e.g.*, telephone and telegraph carriers; and jurisdiction under Title III of the Act over the field of "radio broadcasting" and relating to the radio *transmission* function. The two functions do not overlap. Wire communications cannot be controlled under Title III, and non-common carrier radio transmissions cannot be regulated under Title II. Thus, a resolution of the present jurisdictional conflict requires an analysis of the scope of each Title standing alone.

The Commission has consistently held that CATV systems are *not* common carriers within the meaning of Title II of the Act, and the Commission's ruling in this regard has been approved on appeal. *Philadelphia Broadcasting Co. v. Federal Communications Commission*, 359 F.2d 282 (D.C. Cir. 1966). Further, the Commission has held that CATV sys-

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[4] Thus, Title II "follows provisions of the Interstate Commerce Act, now applicable to communications . . ." (S. Rep. No. 781, 73rd Cong., 2d Sess. 3 (1934)), and Title III ". . . consists of the Radio Act of 1927 written to bring into a single title effective provisions of that Act . . .".

tems are not broadcasters nor engaged in radio broadcasting. *Second Report and Order* (A. 8); *CATV and Repeater Services*, 26 FCC 403, 428-430, 18 Pike & Fischer R.R. 1573, 1600-1602 (1959).

Notwithstanding the latter holdings, the Commission has based its assertion of jurisdiction over CATV under certain broad provisions of Title III of the Act. Title III deals with "radio" *broadcasting* and "radio" *transmission*. This is the purpose of Title III (as it was the purpose of the Radio Act of 1927) – "It is the purpose of this Act . . . to maintain the control of the United States over all channels of interstate and foreign radio *transmission* . . ." 47 U.S.C. § 301. But CATV systems are not engaged in radio communications or radio transmission of energy. With respect to CATV systems which obtain television broadcast signals solely by means of off-the-air reception, the CATV system in no way is involved with the use of radio frequencies or with any possible radio interference. CATV systems are *reception* services, *not* transmission services.

With respect to its regulation under Title III of the Act, the method of regulation chosen by the Congress was by means of the *licensing* function. This Court specifically noted this restriction in *Regents v. Carroll*, 338 U.S. 586, (1950), as follows:

> "As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress . . . these cases . . . make clear that *the Commission's regulatory powers center around the grant of licenses*. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions." 338 U.S. at 597-99. (Emphasis added.) *See also Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *National Broadcasting Company v. United States*, 319 U.S. 190 (1943).

This limitation on the Commission's authority was also recognized by this Court in *Federal Communications Com-*

mission v. American Broadcasting Co., 347 U.S. 284 (1954). This case dealt with the network "give-away" programs of a few years ago, and the relationship between the Commission's action with respect thereto and the general sanctions of the United States Criminal Code against broadcasting lottery information, 18 U.S.C. § 1304:

> "Like the Court below, we have no doubt that the Commission concurrently with the Department of Justice, has power to enforce Section 1304. Indeed, the Commission would be remiss in its duties if it failed, *in the exercise of its licensing authority*, to aid in implementing the statute, either by general rule or by individual decisions. *But the Commission's power in this respect is limited by the scope of the statute.* Unless the 'give away' programs involved here are illegal under Section 1304, the Commission cannot employ the statute to make them so by agency action." 347 U.S. at 289-90 (Emphasis added).

See also *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 433-34 (1963) (concurring opinion).

Notwithstanding this limitation on its authority, the Memorandum Opinion of Law embodied in the *Second Report and Order* (A. 69) attempts to justify the Commission's assertion of jurisdiction over CATV systems because of what it terms the broad statements of purpose, application and definition contained in Title I of the Act (Sections 1, 2 and 3; 47 U.S.C. §§ 151, 152 and 153); and the general Rule Making authority granted to it by Sections 4(i) and 303(f) and (r), 47 U.S.C. §§ 154(i) and 303(f) and (r) which, in turn, says the Commission ". . . includes authority to take action necessary, not inconsistent with the Act or law to prevent frsutration of Section 307(b) by CATV - and 'interstate communication by wire' to which the Act's provisions are applicable (Sections 2(a) and 3(a)". *Second Report and Order* (A. 71). The Commission also premises jurisdiction on its conclusion that CATV systems have a "uniquely close

relationship to the regulatory [broadcast] scheme embodied in Sections 303(h) and 307(b)" (A. 72).

However, the Commission's vague reasoning simply will not sustain jurisdiction as to CATV activities which are plainly not within the scope of Congress' specific statutory language. When the Act itself is examined, it is discovered that not only is language lacking to give the Commission jurisdiction, but the language of the statute expressly denies such jurisdiction. The simple reading of the Sections cited by the Commission as confirming jurisdiction discloses this to be the fact.

The invocation of the Rule Making provisions of Section 4(i) and 303(f) and (r), 47 U.S.C. §§ 154(i) and 303(f) and (r) is misplaced, since these sections confer no independent substantive power, but relate only to other substantive provisions of the Act.[5] There is no question but that the Commission has been given the authority by Congress to adopt Rules and Regulations and to take such actions as are "not inconsistent with the Act or law". However, as *Regents v. Carroll* indicates, the Rule Making provisions have meaning only as they are related to the Commission's authority to license. "Congress has enabled the Commission to regulate . . . through a licensing power. It is in connection with this power that Section 303(r) is to be interpreted." *Regents v. Carroll, supra* at 600.

Sections 303(f) and 303(h) of the Act are to be interpreted likewise. Section 303(f) merely allows the Commission to "make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations. . . ." Section 303(h) gives the Commission "authority to establish areas or zones to be served by any station." Both Sections again have nothing at all to do with

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[5]For the legislative history of 47 U.S.C. § 154(i) see Appendix B of the Brief of Respondent Southwestern Cable Co.; and for legislative history of Section 303(r) see Appendix C of the Brief of Respondent Southwestern Cable Co.

CATV. CATV systems *do not* cause interference nor do they have anything to do with zones or areas in which radio broadcasting stations are located.[6] An examination of all of the provisions of Section 303 in *context* clearly indicates the relation of that entire Section to the *broadcast licensing* function. For example, Section 303(a) of 47 U.S.C. deals with the classification of *radio* stations; 303(c) with *frequency* bands; 303(e) with the "purity and sharpness of the emissions from each station"; 303(i) with chain broadcasting; 303(k) with radio stations on "railroad rolling stock"; all of which are related to the transmission function and as noted in *Regents v. Carroll, supra,* to the method chosen by Congress to implement regulation, *i.e.*, licensing. CATV systems do not require Commission licenses, nor have Amici sought license authorization from the Commission.

The purpose and definitions Sections of the Act cited by The Commission provide no basis for its jurisdictional attempt. Section 1 of the Act, 47 U.S.C. § 151, states that:

> "the purpose of the Act is to regulate interstate and foreign commerce and communications by wire and radio so as to make available, as far as possible, to all of the people of the United States, a rapid, efficient, Nationwide, and worldwide wire and radio communication service . . . for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies. . . ."

The purpose of the Federal Communications Commission and the Communications Act is thus stated in general terms which, however, do not define or confer any specific jurisdiction.

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[6] The Commission's authority under 47 U.S.C. § 303(h) relating to broadcast zones and areas is concerned mainly with radio interference and allows regulations dealing with transmitting powers and classes of operating stations; the purpose again being to avoid the chaos and confusion arising from the essentially unregulated radio system of the early days of broadcasting.

Section 2 of the Act, 47 U.S.C. § 152, states that the provisions of the Act "shall apply to all interstate and foreign communications by wire or radio. . . ." Rather than conferring jurisdiction on the Commission over all such communications, this Section rather merely describes in general terms the scope of the Act and the outside limits of its application. This reading is emphasized by the second sub-division of Section 2, which indicated that the Act shall not be construed to give the Commission jurisdiction with respect to *intrastate* communications service by wire or radio.

Section 3 of the Act is merely the definitions section thereof which again confers no jurisdiction. As Commissioner Loevinger pointed out in his opinion concurring in part and dissenting in part in the *Notice of Proposed Rule Making in Docket Nos. 14895, 15233 and 15971*, 4 Pike & Fischer R.R. 2d at 1719 (1965), a number of terms are defined in Section 3 of the Act, 47 U.S.C. § 153, including the terms "United States", "person" and "State Commission", it being obvious that the Commission does not have jurisdiction over these parties or persons.

Perhaps the most significant basis of the Commission's asserted jurisdiction over CATV systems is its contention that such regulation is necessary to avoid frustration of the provisions of Section 307(b) of the Act, 47 U.S.C. § 307(b). However, like the other sections of the Act relied upon by the Commission and heretofore discussed, Section 307(b) also is specifically limited to the licensing and regulation of *radio* stations. Amici's CATV systems and all other "off-the-air" CATV systems, however, do not rely on radio frequencies to supply CATV service to their subscribers; and, as the Commission concedes, have no need for an FCC license.

The positioning of Section 307(b) with arguments relating to the establishment of new broad national communications policies is misplaced. Section 307(b) merely requires the Commission in considering its *licensing* function to make "such distribution of licenses, frequencies, hours of opera-

tion, and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service" to each of the same. The legislative history of the Communications Act of 1934 makes it clear that this provision was intended only to avoid the serious frequency congestion and interference which had been caused by the proliferation of essentially unregulated radio stations during the early radio period. Since the frequency spectrum is limited, the Commission is required to be equitable in its allocation of the radio band so that some of the states and communities will not be left out or "short changed".

This basis for 307(b) stems in part from the situation in the early days of radio when the Secretary of Commerce had no control over the *location* of radio stations. Not unsurprisingly, large numbers of such stations were located in or near major metropolitan centers such as Chicago and New York. Section 307(b) is intended solely to insure efficiency and preciseness in the frequency allocations function. As in the case of the other sections of the Act heretofore analyzed, the plain words of the statute are quite clear – it is transmission and *not* reception that is involved.

What is actually involved in the Commission's attempt to seize jurisdiction over CATV is the first control over the *reception* of radio and television signals, a claim of jurisdiction never before made by the Commission. The Commission has now told the American viewing public what television signals they may receive, during what hours, and in what geographic areas. This is a far cry from telling potential users of the scarce radio spectrum, what frequencies, if any, they may transmit on and under what conditions such transmission will be permissible. No judicial authority supports a re-interpretation of the Communications Act which gives the Commission power to control the *reception* of radio signals, as distinct from their *transmission*.

The Commission has specifically disclaimed such jurisdiction on a number of previous occasions. *Cable Vision Inc.*

v. *KUTV, Inc.*, 211 F. Supp. 47, 55 (1962), *rev'd on other grounds*, 355 F.2d 348 (9th Cir. 1964); and, recognizing its clear lack of same, has requested Congressional action, as early as 1959, S.2653, 86th Cong., 1st Sess. (1959); S. Rep. No. 923, 86th Cong., 1st Sess. (1959) in which the Senate bill was labeled as an act "to establish jurisdiction" in the Commission, and as late as 1966, to obtain such authority, H.R. 13286, 89th Cong. 2d Sess. (1966); H. Rep. No. 1635, 89th Cong., 2d Sess. (1966). The Communications Act has not changed since the Commission's several prior interpretations thereof concerning CATV, nor has Congress recognized the need for such legislation. The Commission is thus left where it was eight years ago, *i.e.*, finding no jurisdiction within the four corners of the single statutory basis of its own authority over the Communications transmission system of the United States.

The inconsistency of the Commission's present position and the over-reaching nature of its CATV jurisdictional attempt is perhaps best illustrated by its conduct in 1962 in connection with the All-Channel Receiver Law, which Act is relied upon now, in a clear afterthought, as a major policy basis for its jurisdiction. In 1962, the Commission sought and received Congressional legislation designed to allow the Commission to require UHF reception capability for all commercial television receivers. 47 U.S.C. §§ 303(s), 330 (1962), H. Rep. No. 1559, 87th Cong. 2d Sess. (1962); S. Rep. No. 1526, 87th Cong., 2d Sess. (1962).

There would appear to be no clear or significant distinction between such limitation on the use of individual *receiving* sets and the present attempted foreclosure or limitation on the use of various CATV receiving apparatus, the former of which the Commission felt in 1962 required an amendment to the Act since its "present authority" was "not commensurate with its responsibilities." *Hearings on H.R. 8031 Before the House Committee on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 8 (1962). However, in the space of four short years, the Commission indicates that it needs

no Congressional legislation to accomplish the latter purpose. If the Commission's argument that any instrumentality which is incidental to or used in the process of transmitting picture or sound which forms a connecting link in the chain of communication between the transmitting station and the viewing public is subject to Commission jurisdiction is valid, then the All-Channel Law was completely unnecessary, since television and radio receiving sets are just as much within the jurisdictional concept as CATV systems and broadcasting stations. Neither the Commission nor the Congress has ever acted on this premise, but, on the contrary, both have proceeded on the completely opposite assumption.

Commissioner Loevinger well pointed out the logical extension of this "interstate chain of communications" theory:

> "If this jurisdictional foundation is sound for CATVs the Commission may, by precisely the same technique, impose its regulations on theatres or newspapers, on stockbrokers or taxicabs, indeed on any business or person that needs and uses the service of a communications common carrier." *Notice of Proposed Rule Making in Docket Nos.* 14895, 15233, 15971, 4 Pike & Fischer R.R. 2d at 1718 (1965).[7]

See also the following Congressional minority views on the latest Commission attempt to obtain jurisdiction from the Congress:

> "If the Congress passes H.R. 13286, it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals—jurisdiction positively denied

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[7]The Commission almost annually requests the Congress to confer upon it the statutory jurisdiction to regulate the televison networks, arguing that such jurisdiction is essential in the public interest. But under the Commission's theory of CATV jurisdiction, it already clearly has control over network practices, since there is no clearer example of an "essential link" in an interstate chain of communications. Yet the Commission does not assert authority over these practices without Congressional approval.

the Federal Communications Commission under the Communications Act of 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from Satellite transmittals as well as local broadcasting stations and network broadcasts. Freedom requires that the full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its Rule-Making powers." See H. Rep. No. 1635, 89th Cong., 2d Sess. (1966) Minority Report at 24-25.

C. The Implied or General Powers of Federal Administrative Agencies To Regulate Areas of Aligned Activities Which Affect the Regulatory Scheme of an Agency Repose No Power in an Agency To Expand Its Jurisdiction to Wholly Distinct and Heretofore Unregulated Enterprises.

Those cases which have recognized a certain and limited implied agency authority to deal with activities which might affect the regulatory system entrusted to the agency do not help the Commission expand its statutory mandate to include jurisdiction over CATV Systems. *American Trucking Ass'ns v. United States*, 344 U.S. 298 (1953), and *National Broadcasting Company v. United States*, 319 U.S. 190 (1943), involved much more limited and closely aligned situations than are involved in the case of CATV. In these cases, this Court held that the regulatory agency having jurisdiction over a particular field of activity and an *enterprise within that field* could act with reference to a particular *practice by that enterprise* not specifically described in the agency's basic enabling statute. *Practices* not conceived of at the time of passage of the basic act, and subsequently conducted by clearly jurisdictional companies, have been held to be within the regulatory agencies' purview. However, the hold-

ings of these cases are not germane to the question of jurisdiction of the agency over an entirely distinct industry. Though the Interstate Commerce Commission can preclude a certain *practice* by a clearly jurisdictional trucking company, not specifically set forth in the Act, it does not follow that the Commission may inherently regulate all uses to which the trucker's goods are ultimately put by its customer.

Rather than the policy position relied upon by the Commission as expressed in the *American Trucking* case, it is the policy set forth in *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949) and similar cases which govern the situation here. There, this Court struck down the Federal Power Commission's attempt to subject undeveloped leaseholds to its jurisdiction, even though the party's basic operation was concededly within the agency's general jurisdiction. This Court's language in *Panhandle* is particularly relevant here.

> "Nothing in the sections indicates that the power given to the Commission over natural-gas companies by § 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the Constitutional limit of congressional authority over Commerce.
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> * * *
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> Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history, we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production. . . . *We cannot attribute to Congress the intent to grant such far-reaching powers as implied in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of Federal power.*" 337 U.S. at 508, 513-14. (Emphasis added.) See also *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

The concluding paragraph of Commissioner Loevinger's dissent to the Commission's assertion of CATV jurisdiction summarizes particularly well the issues involved in this case with respect to the question of the Commission's jurisdictional attempt. Commissioner Loevinger stated, *inter alia*, as follows:

> "However, it seems to me that the most basic and important issue involved here is far more important than the interests of the broadcasters, the CATVs, or even of the audience in securing broadcasting service. The basic issue involved here is whether a great government agency will show reasonable respect for its own precedents and reasonable restraint in seeking to extend the scope of its own power. Undoubtedly the independent regulatory agencies have been given great power and broad discretion in its exercise. But if democratic government is to survive, the corollary of great power and broad discretion must be a strong impulse of self-restraint in the exercise of such power. In the face of statutory language, the Commission's own precedents, the prior statements of the Commission to the courts and its requests to Congress for legislation on this subject, it seems to me to be presumptuous for the Commission now to assert jurisdiction which it has previously explicitly disclaimed. If the laws are inadequate to cope with the problems of the moment, it is the function of the Congress to remedy that lack. There is no reason to assume that Congress is any less responsive than the Commission to the public interest, or that it is unable or unwilling to act if action is needed in this field at this time. I am, accordingly, compelled to dissent from the Commission's efforts to extend its jurisdiction without specific Congressional authority." *Notice of Rule Making in Docket Nos. 14895, 15233 and 15971*, 4 Pike & Fischer R.R. 2d at 1724 (1965).

In the present case, the Commission is confronted with a very complex problem concerning the development of a cohesive, visionary and broad range policy on national com-

munications. Yet, the Commission was the first to point out when it embarked on its jurisdictional coup that it lacked the knowledge and experience with respect to CATV to promulgate a decipherable pattern of policy. In fact, this agency, which has been entrusted by Congress with the main responsibility for the husbandry of our nation's communication policy, has many times been found woefully inadequate for the onerous task associated therewith. The late Dean Landis in his Report on the Regulatory Agencies in 1960 stated:

> "The Federal Communications Commission presents a somewhat extraordinary spectacle. Despite considerable technical excellence on the part of its staff, the Commission has drifted, vacillated and stalled in almost every major area. It seems incapable of policy planning, of disposing within a reasonable period of time the business before it, of fashioning procedures that are effective to deal with its problems . . . On major policy matters, the Commission seems incapable of reaching conclusions." Staff of Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, 86th Cong., 2d Sess., Report on Regulatory Agencies to the President-Elect 53 and 54 (Comm. Print 1960).

Amici call these matters to the attention of the Court because they believe that the importance of the issues involved, the Commission's own uncertainty as to its jurisdiction (evidenced by its complete about face from its previous position that it did not have authority to regulate CATV), and its repeated failures to obtain Congressional approval of its assertion of jurisdiction over CATV, makes it imperative that Congress be the one to exercise its will on the complex issues and policy considerations involved. Indeed, the type of policy questions raised by the advent of CATV are, in the view of Amici, the type of questions that can only be completely and finally answered by the representatives of the electorate.

In regard to the Commission's assertion of powers heretofore disclaimed, the Commission (Br. pp. 40-41, ftn. 31) and Midwest Television (Br. p. 31) assert that past disclaimers of authority over CATV do not now preclude the assertion of this authority. In addition, Petitioner Midwest Television (Br. p. 31) also makes the contradictory argument that repeated failures of the Commission to obtain Congressional sanction of its attempts to control CATV warrant the inference that Congress is content to allow the Commission to proceed with its CATV Rules. These two contentions are incredible.

If an agency of *limited and defined powers* may say today that it does not possess a certain power, and tomorrow, say that it has always had this power, totally disregarding its previous conclusions, then there is and can be no such thing as an agency with limited and defined powers. And, if this be so, what purpose can be found in Congress' enacting legislation specifically detailing the powers and the authority of an agency? Congress does not enact legislation without meaning. If the provisions of a Congressional enactment limiting an agency's powers are to have any meaning, then a legitimate interpretation of those provisions by the very agency created thereby, which finds that Congress has not delegated some specific authority, must be given some weight, must affect the course of future action by that agency and color any contrary assertions of authority in the future by that same agency.

D. The Decision in Buckeye Is in Error and Should Not Be Followed by this Court.

The decision of the United States Court of Appeals for the District of Columbia Circuit in *Buckeye Cablevision, Inc. v. Federal Communications Commission,* No. 20,274 (D.C. Cir. June 30, 1967) is completely erroneous for the following basic reasons: (1) The case presented only a limited challenge to the Commission's jurisdiction in the posture of an appeal from a cease and desist proceeding; (2)

the Court ignored completely the previous history of regulation by the Commission from its very inception; (3) the Court misconstrued the holding in *Regents v. Carroll;* and (4) the Court in effect based its decision on its view of what the Commission's jurisdiction *should be* under the Communications Act of 1934, rather than on what the jurisdiction *is.*

In *Buckeye,* the District of Columbia Circuit was presented with a limited challenge to the Commission's jurisdiction in an appeal initiated by Buckeye after the Commission had ordered Buckeye, pursuant to Section 312 of the Communications Act of 1934, 47 U.S.C. § 312, to cease and desist from a purported violation of one of the sections of the new CATV rules. The jurisdictional issue was not briefed by Buckeye until after oral argument was heard on its appeal. On the very day Buckeye's supplemetal brief on Jurisdiction was filed, the Commission released the text of its Memorandum Opinion and Order denying the petition of Buckeye and the other petitions for reconsideration of the Second Report and Order. Because Buckeye had not had a full opportunity to call the court's attention to the summary manner in which the Commission refused to reconsider or hear argument on the jurisdictional question, Buckeye moved the District of Columbia Circuit to withdraw the jurisdictional issue, or in the alternative to dismiss its appeal. This motion was denied and the Court insisted on reaching the jurisdictional question in its opinion.

From the above, it is evident that the *Buckeye* Court was presented with only a very limited jurisdictional challenge that did not encompass the full range of Commission CATV rule-making actions, and that did not raise all of the jurisdictional questions which have been presented by Buckeye and other CATV petitioners in the Eighth Circuit case. Because the *Buckeye* decision relfects only a limited presentation of the jurisdictional question, for this reason alone this decision should not control this Court's disposition of the basic jurisdictional question presented for decision herein.

Moreover, in *Buckeye* the Court completely ignored the entire past history of regulation by the Commission, as well as the legislative history of the Communications Act, which reflects that the Commission's exercise of its licensing function is to be limited to those licensees subject to its jurisdiction under Title III. In fact, the *Buckeye* Court, in attempting to find judicial support for its decision, relies solely upon precedents involving licensees. For example, *Carter Mountain Transmission Corp. v. Federal Communications Commission,* 321 F.2d 359, *cert. denied,* 375 U.S. 951 (1963), upheld the imposition, after evidentiary hearing, of a condition on a microwave common carrier. In *Philadelphia Broadcasting Co. v. Federal Communications Commission,* 359 F.2d 282 (D.C. Cir. 1966), the Court did not decide the question of jurisdiction over CATV systems, but only that an agency, *if* it has jurisdiction, may, where alternate methods of regulation are available, make the ultimate determination as to what means or method of regulation are most reasonable. Consequently, the language of *Buckeye* (Slip Op. p. 8) concerning the wide latitude an expert agency possesses in coping with new developments in a dynamic industry is mere dictum insofar as the central question of jurisdiction is concerned.

The Court in the *Buckeye* decision not only ignored the entire history of regulation by the Commission, but also misconstrued the actual holding of *Regents v. Carroll.* The *Buckeye* decision reads in part as follows:

> "In *Carroll,* the Supreme Court held that the Commission's duty to effectuate the public interest requirements of Subchapter III 'centered' [footnote omitted] around its licensing power, which does not encompass abridgement of contracts between licensees and third parties. But the Court's view of this limitation was based largely on the agency's lack of authority at that time to issue cease and desist orders, against licensees or anyone else, to prevent violations

> of the Act. Subsequently, Congress conferred such authority [footnote omitted] which correspondingly expanded the Commission's power to protect the regulatory scheme." Slip Op. p. 7.

This narrow reading of *Regents v. Carroll*, however, completely ignores the language of this Court that the Commission's powers under Title III are clearly limited to its licensing function.

Buckeye also erroneously accepts the underlying basis of the Commission's regulation of CATV, *i.e.*, that "protection" of the television broadcaster is necessary to prevent "unfair competition". The Commission has neither the authority nor the jurisdiction to determine questions of economic competition. *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348, *cert. denied*, 379 U.S. 989 (1965). Regulation and control to prevent methods of competition fall under the jurisdiction of the Federal Trade Commission, under the Federal Trade Commission Act, as amended, 74 Stat. 200, 15 U.S.C. § 45(a) (1960). The Commission has similar authority nor the expertise to exercise it were the authority present. Moreover, the delegation of enforcement of the CATV rules to the "competitive" industry accomplished by the CATV non-duplication requirements (exercised at the discretion of the television station) is in direct conflict with this Court's decision in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), where it was emphasized that the Communications Act, unlike many other industry regulatory acts, "recognizes that the field of broadcasting is one of free competition". The protectionist concepts embodied in the Commission's CATV regulatory scheme clearly violate this basic principle.

The *Buckeye* Court was clearly troubled by the Commission's assertion that is entire regulatory scheme would suffer if CATV were to remain unregulated. This Court, in effect, affirmed what the Court thought the Commission's jurisdiction should be. But that is not the point. As discussed in

detail herein, the question is not what a court might believe the jurisdiction of an agency of limited powers should be, but what it *is*.

II

THE COMMISSION LACKS THE STATUTORY POWER TO ISSUE AN INTERIM ORDER MAINTAINING THE STATUS QUO PENDING A HEARING TO DETERMINE THE IMPACT ON LOCAL BROADCAST TELEVISION OF DISTRIBUTION BY A CATV SYSTEM OF TELEVISION SIGNALS FROM OTHER AREAS OF THE COUNTRY.

The Commission's action in issuing a "temporary" stay without a hearing precluding the Respondents from engaging in lawful operations is as equally without foundation, as is its assertion of jurisdiction over non-licensee CATV systems. Once again, the Commission attempts to justify its unauthorized action by claiming to possess broad authority to do all that is necessary to prevent frustration of the purposes of the Act that it administers. However, the Commission is unable to show where in its Act Cognress conferred such authority on the Commission, other than by resort to the borad general language found in Sections 4(i) and 303(r), 47 U.S.C. §§ 154(i), 303(r), which the Commission terms "sweeping grants of authority". (Commission Br. p. 45).

The Commission is not reticent in describing what it has done. It has exercised the injunctive powers of a Court of Equity because it felt that in the circumstances such a course of conduct was preferable. Nor does the Commission, in its judgment, need specific authority to exercise such extraordinary power, denied so often by the Congress to other administrative agencies. Nor do the traditional concepts of judicial judgment and authority in this area prevail. Witness the following assertion: "The agnecy itself must assess the need for maintaining the status quo. Its powers to do so derive from the same statutory sources that enable it to adopt the final rule." (Commission Br. p. 53)

This is an extraordinary concept and as well as any other example, properly characterizes the real meaning of the Commission's asserted jurisdiction over CATV. Just as no regulatory agency heretofore has assumed power over an entirely new industry not included in its statutory mandate, it is unheard of for such an agency to vest unto itself the authority to enjoin *legal* activities pending a hearing to determine whether such activities should be permanently strained.[8] Not only is no authority found in the Communications Act for such an extension of judicial powers, but the Commission's action in *Southwestern* is directly contrary to all applicable precedents.

> "Congress has granted to some agencies the power to issue orders effectively preserving the status quo, at least for a certain length of time, pending their own decisions. Absent such statutory grant, however, it does not appear that a Federal Administrative agency can issue such orders, *regardless of the harm which may occur pending its decision or the possible inefficiency of orders it may enter after decision.* (Jaffe, *Judicial Control of Administrative Action,* page 662 (1965)) (Emphasis supplied.)

Congress has expressly delegated to the Commission certain interim redress. (See Section 204 of the Act, 47 U.S.C. § 204 dealing with ninety-day suspension of carrier rates and Section 303(m), 47 U.S.C. § 303(m) allowing suspension of radio operators' licenses after 15 days' notice). Section 312(b), 47 U.S.C. s 312(b) confers general power[9] to issue cease and desist orders *following* an evidentiary hearing in which the burden of proof is on the Commission. These *specific* delegations by the Congress establish the *lack* of the general powers claimed by the Commission.

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[8] See Appendix E of the Brief of Respondent, Southwestern Cable Co., "A Study of Injunctive Powers of Administrative Agencies".

[9] For the legislative history of Section 312(b) and related proposals concerning FCC enforcement of powers, see Appendix D of the Brief of Respondent, Southwestern Cable, Co.

The exercise of power akin to judicial injunctive powers by an agency, absent a direct legislative delegation, has been repeatedly struck down by the Courts, as pointed out by Professor Jaffe. The validity of this principle was described by the District of Columbia Circuit Court in a representative case as follows:

> "The power which the Board now claims is in many ways a drastic one, and in fact more akin to judicial injunctive power than the power which Congress has given some agencies to issue cease and desist orders against conduct deemed in violation of law. . . But the Board is not a court, and cannot rely for its action on the powers of a court of equity. On the contrary, the law is settled that an administrative agency can exercise only those powers conferred on it by Congress. [Citations omitted.] *We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency.*" *Trans-Pacific Freight Conf. v. Federal Maritime Board*, 302 F.2d 875, 880 (D.C. Cir. 1962) [Emphasis supplied.]

The Commission's attempts to distinguish the numerous cases supporting this rule of law are not persuasive. See also *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316 (1961); *Federal Trade Commission v. Dean Foods*, 384 U.S. 597 (1966).

This Court should not allow the Commission to devise its own procedural tools which affect the substantive rights of private citizens when Congress has not only failed to grant such power but by express and specific delegations, *e.g.*, Section 312, denied the Commission the power to act as it has done in this case.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Thomas W. Wilson
John D. Matthews
Charles H. Helein
600 Munsey Building
Washington, D. C. 20004
Attorneys for Alice Cable Television Corporation, Amicus Curiae

Robert A. Marmet
Peter L. Koff
1822 Jefferson Place, N. W.
Washington, D. C. 20036
Attorneys for Buckeye Cablevision, Inc., Amicus Curiae

Of Counsel for Alice Cable Television Corporation:

Robert H. Young
Morgan, Lewis & Bockius
2107 Fidelity-Philadelphia Trust Building
Philadelphia, Pennsylvania 19109

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 363

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC., AND JACK O. GROSS, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

BRIEF AMICUS CURIAE FOR BLACK HILLS VIDEO CORPORATION AND MIDWEST VIDEO CORPORATION

WAYNE W. OWEN
Union Life Building
Little Rock, Arkansas 72201

HARRY M. PLOTKIN
GEORGE H. SHAPIRO
1815 H Street, N. W.
Washington, D. C. 20006
Attorneys for Amicus Curiae

Of Counsel:

MOSES, MCCLELLAN, ARNOLD, OWEN & MCDERMOTT
Union Life Building
Little Rock, Arkansas 72201

ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N. W.
Washington, D. C. 20006

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STATEMENT[1]

These cases involve the validity of rules and regulations of the Federal Communications Commission governing the operation of community antenna television (CATV) systems. The matters in issue should be placed in proper perspective by reference to a description of the CATV industry, Commission rule making proceedings, and a description of the Rules and Regulations themselves.

A.

Background

CATV systems had their inception as a means of providing television signals to communities where normal television reception was poor or non-existent. In many such areas television signals could be received from antennas mounted on high towers or located on nearby hilltops, but persons not living in elevated areas or unable or unwilling to construct tall towers for receiving antennas were unable to receive these signals. In order to meet the desire of these people for television service, local entrepreneurs began building antennas at favorable receiving locations and installing cables carrying the signals throughout their communities,

[1] Black Hills Video Corporation and Midwest Video Corporation, hereinafter jointly referred to as "Black Hills," are interested in this proceeding because they operate CATV systems and a microwave company furnishing service to CATV systems. Their business operations are thus affected by the Commission's rules and regulations governing CATV operations. Pursuant to Section 402(a) of the Communications Act of 1934, as amended (47 USC § 402(a)), they have filed in the United States Court of Appeals for the Eighth Circuit Petitions to Review the validity of the Commission's CATV rules and regulations. Oral argument has been held in that case and the matter is under consideration by the Court.

For a fee individual connections to television sets from the cable were made. The antenna to which the television sets were connected by wire served as a single master antenna for many television sets in the community and made available television service that would have been otherwise available on an individual basis only at a very high cost, if at all. The first CATV systems began operation in 1949.[2]

The demand of the American public for more and better television service resulted in the growth of CATV service and the establishment of an entire new industry on the American scene. Early CATV systems were only able to provide their subscribers with the signals of a relatively few stations, generally not more than three stations, and even the ability to provide three signals was dependent upon the receiving antennas of CATV systems being near enough to television stations to be able to receive three signals directly off-the-air. Over a period of time, the technical equipment utilized by CATV systems improved and the number of television channels that could be distributed increased. Modern CATV systems can now receive and distribute to their subscribers on the channels of the CATV system's choice the signals of as many as 12 television stations.

Along with improvements in the technical capability of CATV systems came the ability to provide signals from stations too far distant from the CATV system to be received off-the-air. By the late 1950's, the Commission began licensing carriers to relay television

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[2] See Hearings on H.R. 7715, 89th Cong., before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, pp. 123-124.

signals by microwave, thereby making it possible for the residents of any community in the country with a CATV system to have as much choice of television programming as the residents of the larger cities. Even in the large cities, moreover, CATV systems have developed and grown because of the service they perform in eliminating shadowing and ghosting caused by the presence of tall buildings and in providing the good signal quality necessary for satisfactory color reception. Because of the service they perform, CATV systems have become an important means for the distribution of television signals.

B.

Proceedings at the Federal Communications Commission

At an early stage, the Commission took an interest in the development of CATV. On May 22, 1958, it initiated, in Docket No. 12443, a proceeding which it termed an "Inquiry into the Impact of Community Antenna Systems, TV Translators, TV 'Satellite' Stations, and TV 'Repeaters' on the Orderly Development of Television Broadcasting", 23 Fed. Reg. 3746 (1958). On April 14, 1959, the Commission released a Report and Order in that proceeding, 18 Pike & Fischer RR 1573 (1959). In that Report and Order, the Commission concluded that it could find no present basis for asserting jurisdiction or authority over CATV systems except with respect to incidental radiations of energy pursuant to Part 15 of the Commission's Rules (*id.* at p. 1603). Furthermore, the Commission held that even in passing upon applications for microwave authorizations to deliver television signals to CATV systems, "it is neither proper, pertinent nor necessary . . . to consider the specific lawful use which the common

carrier subscriber may make of the facilities of the carrier." (*id.* at p. 1604).

However, shortly after releasing its Report and Order, the Commission, upon the petition of television station KWRB-TV in Riverton, Wyoming, designated for hearing applications for microwave facilities filed by Carter Mountain Transmission Corporation to deliver television signals to CATV systems operating in the service area of the Riverton station. One of the issues in the hearing was to determine the impact that a grant of the microwave would have on the operation of the television station and the resulting injury, if any, to the public served by it. After hearing, the Commission concluded that a grant of the microwave application would result in the demise of the Riverton station and that the need for a local television outlet and the service it would provide to outlying areas not served by CATV systems outweighed the need for the improved service the microwave station would furnish to the CATV systems. The microwave applications were denied, but "without prejudice however, to Carter's refiling when it is able to show that the CATV operation will avoid the duplication of KWRB-TV programming which now exists and that the CATV system will carry the local KWRB-TV signal." *Carter Mountain Transmission Corp.*, 22 Pike & Fischer RR 193, 194(e) and (f) (1962), *aff'd sub nom. Carter Mountain Transmission Corp.* v. *FCC,* 321 F. 2d 359 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 951 (1963). To the extent that this decision was inconsistent with the views expressed in Docket No. 12443, those views were modified.

Following its decision in *Carter Mountain* the Commission instituted rule making proceedings to regulate

CATV systems receiving their service by means of microwave facilities. This culminated in the *First Report and Order* released on April 23, 1965 (4 Pike & Fischer RR 2d. 1725). By this action the Commission adopted detailed rules and regulations prescribing for microwave-fed CATV systems the stations which they must carry and the non-duplication protection which had to be accorded to the various television stations.

On the same day that the Commission released its *First Report and Order*, it also released a *Notice of Inquiry and Notice of Proposed Rule Making* where for the first time it asserted that it believed it had authority to regulate all CATV systems, whether served off-the-air or by microwave. It appended to the Notice a Memorandum on its Jurisdiction and Authority, setting forth the basis for such jurisdiction and authority (4 Pike & Fischer RR 2d 1679 at 1707).

On March 8, 1966, the Commission released its *Second Report and Order* (A. 1-96).[3] In the *Second Report and Order*, the Commission asserted jurisdiction over all CATV systems and made its rules applicable to all CATV systems,[4] whether off-the-air or microwave-fed.

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[3] "A" refers to the printed Appendix filed in this Court under Rule 36(1).

[4] CATV systems serving fewer than 50 subscribers and apartment house master antennas were excluded from the operation of the Rules. See Rule 74.1101(a) (A. 77).

C.

The CATV Rules

The Commission's CATV rules are lengthy and detailed (A. 77-84, 127-131). The more important provisions thereof may be briefly summarized as follows:

1. Institution of CATV Service

No CATV system which commences operation after February 15, 1966 may initiate service without first giving notice of the name and address of the system, the communities to be served, the television signals to be distributed, and the estimated time operations will commence. The notice must be served on (a) the Commission, (b) the licensee or permittee of any television station within whose predicted Grade B contour it will operate, (c) the licensee or permittee of any 100 watt or higher power translator station operating in the community it will serve, and (d) where a CATV system proposes to carry the signal of a non-commercial educational television station beyond its Grade B contour into a community with an unoccupied television channel reserved for an educational station, the notice must also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area and state educational television agencies, if any.

Similar procedures must be followed whenever a CATV system, new or existing, proposes to add a new distant signal (*i.e.*, a signal of lower intensity than Grade B) to its operations.

2. The Carriage Rule

Every CATV system, new or existing, must upon appropriate request carry television stations in accordance with a system of priorities based upon signal strength.[5] The order of priorities is as follows:

(a) Stations providing a principal city grade signal

(b) Stations providing a Grade A signal

(c) Stations providing a Grade B signal

(d) 100 watt translators located in the community in question.

If the CATV system does not have enough capacity to carry all such stations, it must carry stations in strict accordance with the above priorities. No "distant" station (i.e., a station with a signal of less intensity than Grade B) may be carried until provision is made on the system for all television stations having higher priority.[6]

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[5] Different types of receiver antennas are needed to obtain satisfactory reception depending upon the strength of the television signal in question. In general, it may be said that a conventional indoor antenna is normally adequate to receive principal city grade signals or Grade A signals. A fairly routine type of rooftop antenna is satisfactory in most instances for the purposes of receiving Grade B signals. Distant signals—those beyond Grade B contour—are receivable in many instances by means of somewhat more sophisticated rooftop antennas, and this type of rooftop antenna is in use in many parts of the country enabling reception of signals from stations 80 to 100 miles away.

[6] An exception to the priorities is made when the station making the request for carriage substantially duplicates the programs of another station of equal or higher priority carried on the system and compliance with the request would require the deletion of the signal of an independent commercial television station or a noncommercial educational television station.

3. The Non-Duplication Rule

When two or more stations on the CATV system carry the same programs, the CATV system, upon receiving a request from a station of higher priority, must delete such programs broadcast by a station with a lower priority. Certain exceptions are provided for:

(a) Where the station with higher priority delays the broadcast of the program beyond the day on which it is originally broadcast.

(b) Where the station with higher priority broadcasts a program originated during prime time (generally 6:00 p.m. to 11:00 p.m.) at an hour outside of prime time.

(c) Where the station with higher priority transmits a color program in black and white and a station of lower priority transmits the program in color.

(d) Where the program in question is a live program in which time of presentation is of special significance.

(e) Notwithstanding the priorities, a CATV system is permitted to carry at all times the programs of two networks.

4. Procedure

A complicated procedure is established governing the right of CATV systems to commence operation. It varies depending on whether or not the CATV system is located within the Grade A contour of any television station situated within one of the top 100 markets.[7]

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[7] The largest 100 markets are the markets, as defined by the American Research Bureau, having the largest net weekly circulation. The American Research Bureau is engaged in the business of making television audience surveys for its clients. Its net weekly circulation figures are derived from these surveys.

(a) *For all markets*—Until the expiration of 30 days from the service of the notices described under item 1 above, no new CATV system can commence operation and no CATV, new or existing, can add a new distant signal. If during the 30-day period an objection is filed by any interested person, the stay is automatically continued until the Commission rules on the merits of the objection even though the proposed operation complies fully with Commission Rules and Regulations.

(b) *For top 100 markets*—A full evidentiary hearing is mandatory whenever a CATV system desires to import a distant signal. The requirement of a hearing may be waived upon appropriate showing.

(c) *Special relief in any market*—Any interested person may at any time file a formal petition or informal letter requesting the Commission to impose additional or different requirements from those set forth in the published rules and regulations. The Commission may grant temporary or interim relief pending a final ruling on the request for special relief.

5. Grandfather Rights

Any CATV system in operation on February 15, 1966 may continue operating. However, no existing CATV system can add a new distant signal without complying with the procedure prescribed for new systems. Moreover, carriage of distant signals in areas of geographical expansion of existing systems in the top 100 markets is restricted. Finally, all existing CATV systems in any market are subject to the special relief power with respect to Grade B as well as distant signals.

D.

The Instant Case

This case involves three CATV systems in San Diego, California each of which commenced operation prior to February 15, 1966. Each system carries the signals of Los Angeles stations as well as those of San Diego-Tijuana, Mexico. Petitioner Midwest Television Inc., licensee of VHF television station KFMB-TV, San Diego, initiated the proceeding by filing a petition with the Commission requesting special relief, both interim and permanent, against the expansion of the CATV systems insofar as the carriage of Los Angeles signals was concerned. The Commission on the basis of the pleadings filed by the parties concluded (A. 161) that the pleadings "presented a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area." The Commission granted interim relief by forbidding the CATV systems to expand into new geographical areas not served on or before February 15, 1966 unless the service in such new areas was limited to carriage of signals from stations located in the San Diego area.[8] New subscribers could be added in geographical areas served by the CATV system prior to February 15, 1966 and in these latter areas the CATV systems could carry Los Angeles as well as San Diego stations. In arriving at this determination the Commission resolved the dispute between the parties as to whether the Los Angeles signals were Grade B or distant by assuming that the signals were in fact of Grade B quality (A. 165). A hearing was ordered on the

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[8] Included within such area are the stations located in Tijuana, Mexico.

matter of a final order but the interim relief remained in effect pending the hearing.[9]

The CATV systems petitioned the Court below to review and set aside the interim relief ordered by the Commission. The Court held that the Commission lacked the authority to grant the interim relief.

SUMMARY OF ARGUMENT

I.

The Commission lacks statutory authority to regulate CATV systems. The Commission must derive any jurisdiction it has either from Title II or Title III of the Communications Act of 1934 (47 USC § 151 et seq.). *Regents of Georgia* v. *Carroll,* 338 U.S. 586 (1950). Title II is concerned with common carriers and is not applicable to CATV since even the Commission concedes CATV does not constitute common carrier activity, *Philadelphia Television Broadcasting Co.* v. *Rollins Broadcasting Inc.,* 5 Pike & Fischer RR 2d 677 (1965), *aff'd sub nom. Philadelphia Television Broadcasting Co.* v. *FCC,* 359 F. 2d 282 (D.C. Cir. 1966).

The Commission relies on Section 3(a) of the Communications Act (47 USC § 153(a)) defining "communication by wire" and on Section 2 (47 USC § 152) which makes the provisions of the Act applicable to all interstate communication by wire or radio to bring CATV under its Title III functions. This reliance is misplaced. The structure of the Communications Act and its legislative history demonstrate that the Federal

[9] Although an Initial Decision has been issued by the Hearing Examiner in the hearing case, the Commission itself has as yet not issued its decision. Meanwhile it adheres to the interim order first issued in July, 1966.

Communications Commission derived its Title III powers from the Radio Act of 1927 (47 USC §§ 81 et seq.) which did not apply to "communication by wire". The Federal Communications Commission's Title II jurisdiction was taken over from the Interstate Commerce Commission which had no Title III powers. In the new Act the Federal Communications Commission was given no Title III powers over communication by wire.

Nor can the Commission's jurisdiction be founded on Section 3(b) (47 USC § 153(b)), defining "radio communication". The Commission did not rely on that section in adopting its rules and regulations and cannot advance it here. *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194 (1947). But the objection to reliance on Section 3(a) is more fundamental than *Chenery*. The powers of the Commission under Title III are limited to regulation of radio transmission alone. This is explicitly so stated in Section 301 of the Communications Act (47 USC § 301) and was so understood by Congress in enacting the Radio Act of 1927, the predecessor of Title III. See *National Broadcasting Co.* v. *U. S.*, 319 U.S. 190, 210-213 (1943).

The specific statutory provisions in Title III relied upon by the Commission confer no jurisdiction over reception. Sections 4(i) and 303(r) (47 USC §§ 154(i) and 303(r)) are general in nature and confer no independent power. *Regents of Georgia* v. *Carroll*, 338 U.S. 586, 600 (1950). Section 303(f) (47 USC § 303 (f)) authorizes rules and regulations designed to prevent interference among stations, Section 303(h) (47 USC § 303(h)) authorizes the Commission to prescribe the areas or zones to be served by stations, and Section 307(b) (47 USC § 307(b)) directs the Commission to

make an equitable allocation of radio services among the several states and communities. These powers all relate to radio transmission.

In the past the Commission has recognized that it had no jurisdiction over reception. It expressly so held in 1959 with respect to CATV. *Inquiry Into Impact of CATV,* 18 Pike & Fischer RR 1573 (1959). In 1962 it took the same position when it asked Congress to adopt the All Channel Receiver Law—Sections 303 (s) and 330 (47 USC §§ 303(s) and 330).

II.

The Regulations involved in this case establish a licensing system which is not provided for by the Act. Although the regulations themselves do not contain the word "license", their structure is such that Federal Communications Commission permission is necessary for CATV systems to commence operation. The necessity for requesting and obtaining permission is "licensing" as defined by Section 2(e) of the Administrative Procedure Act. 5 USC § 1001(e). In the case of radio transmission, the Communications Act specifically requires a license and prescribes the standards and procedure which should govern Commission action. Congress should not be presumed to have granted licensing power over a communications medium without a clear and specific directive to that effect. *Cf. Bantam Books Inc.* v. *Sullivan,* 372 U.S. 58 (1963); see also *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Company,* 289 U.S. 266 (1933); *National Broadcasting Co.* v. *U.S.,* 319 U.S. 190 (1943).

III.

There is a third and independent ground for upsetting the Commission's action. It relates to Rule 74.1109

under which this case arose. That Rule provides that notwithstanding any other rule the Commission may upon request of any interested person "waive any provision of the Rules" or may "impose additional or different requirements." The existence of such a rule renders rule making nugatory. It amounts to a declaration by the Commission that it can promulgate a rule which simply states that no CATV operation can be commenced or carried on except pursuant to a determination by the Commission on a case-by-case basis in ruling upon requests of interested persons for special relief. The ambit of the special relief requested is limitless. If Congress attempted to delegate administrative authority to an agency with such loose standards serious constitutional doubt would attach to the action. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935). The Commission has arrogated such a power to itself without Congressional action.

ARGUMENT

The Commission by its *Second Report and Order* has adopted a comprehensive set of regulations governing all aspects of CATV operations.[10] These rules prescribe the conditions under which persons may initiate

[10] Although the Commission's *Second Report and Order* is applicable to both microwave-fed and off-the-air CATV systems, the three CATV systems involved in this proceeding are all off-the-air systems. The horrendous consequences conjured up by the government (Br. 34-35) and Midwest Television Inc. (Br. 32-33) which would result from importation of New York and Los Angeles signals to cities throughout the country are irrelevant to this case. Such importation can take place only if the Commission grants a microwave application for that purpose. Such is not the situation in the instant case where no radio authorization is required. The signals carried on the CATV systems are captured directly off-the-air in the same manner as is done by conventional receiving antennas.

CATV service or expand existing operations; they govern the signals which must be carried by the CATV systems and those whose carriage is prohibited; they establish a detailed system of priorities which require CATV systems to black-out programs of certain stations in order to protect the economic interests of other stations; they formulate rules of procedure governing the administration of the regulatory system; etc. Then the Commission adds a catch-all Rule 74.1109 which in essence provides that notwithstanding any other provisions of the rules the Commission may upon request of any interested person "waive any provision of the rules" or "impose additional or different requirements". The special procedure is invoked by the filing of a formal complaint or by informal letter. Persons affected by the request for special relief are permitted to file responsive pleadings. The Commission reserves to itself the right to grant or deny the relief requested with or without a hearing and if a hearing is ordered to provide for interim relief on the basis of the pleading. The interim relief granted in this case is bottomed on Rule 74.1109.

Black Hills urges that Rule 74.1109 is a shocking abuse of administrative power. Whatever statutory authority has been conferred upon the Commission to promulgate rules and regulations governing CATV activity, it cannot serve as a valid base for a rule like § 74.1109. A rule which reserves to an administrative agency the choice of arbitrary action which is implicit in Rule 74.1109 makes a mockery of administrative law. The Court can, therefore, summarily reverse the Commission's action in this case and sustain the ruling of the Court below because of the infirmities of Rule 74.1109 without considering the more wide reaching questions concerning the scope of Commission author-

ity under the Communications Act with respect to CATV activities. However, since the Court in granting certiorari did not limit its consideration to Rule 74.1109, Black Hills will address itself to all aspects of the case.

I.

THE COMMUNICATIONS ACT PRECLUDES COMMISSION ACTION IN THE CATV FIELD

Petitioners devote most of their briefs to a description of what they regard as the evils of CATV on the premise that if there is a problem in the communications field in need of remedy, the Commission has plenary authority to prescribe the remedy. This theory is stated in almost so many terms at the outset of the government's Brief as follows (p. 28):

> "Once the nature of CATV and its potential impact on broadcasting is comprehended, it is virtually self-evident that the administrative agency charged by Congress with the regulation of broadcasting, and endowed with sweeping authority to perform that function, has jurisdiction to regulate this new and significant development in the communications field."

The government's position overlooks the fact that as an administrative agency it is empowered to exercise only that authority which has been committed to it by Congress. An administrative agency must find its powers within the compass of the authority given it by Congress. *Regents of Georgia* v. *Carroll,* 338 U.S. 586 (1950). The Communications Act of 1934, as amended, (47 U.S.C. § 151 et seq.) is the statute which creates the Commission and sets forth its powers and functions.

The Communications Act of 1934 resulted from the efforts of Congress to create an administrative agency

with regulatory power over electrical communication. To accomplish this result, the functions which the Interstate Commerce Commission formerly performed under its Act with respect to communications common carriers were transferred to the FCC and the provisions of the Interstate Commerce Act on this subject became, with modifications, Title II of the Communications Act.[11] The functions with respect to radio had formerly been discharged by the Federal Radio Commission under the Radio Act of 1927 (47 USC §§ 81 et seq.). This Act with some modifications became Title III of the Communications Act and the Federal Radio Commission was abolished.

If the Commission has any authority over CATV operations, it must come from either Title II or Title III of the Communications Act; the other Titles of the Act do not endow the Commission with substantive authority. Title II has no applicability to CATV since even the Commission has admitted that CATV operations do not constitute common carrier activities under the Act.[12] The Commission relies upon Title III for

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[11] Certain limited authority over communications common carriers was formerly exercised by the Postmaster General and was also transferred to the Commission by the Communications Act of 1934 (See 47 USC § 601(b)).

[12] *Philadelphia Television Broadcasting Co.* v. *Rollins Broadcasting, Inc.*, 5 Pike & Fischer RR 2d 677 (1965), *aff'd sub nom.*, *Philadelphia Television Broadcasting Co.* v. *FCC*, 359 F. 2d 282 (D.C. Cir. 1966). The government (Br. 47, n. 36) has attempted to construe this decision as upholding "as rational and permissible the Commission's determination to regulate CATV systems as adjuncts of the country's broadcasting system rather than as common carriers . . .". This is not at all the holding of the case. The Court made it quite clear (359 F. 2d at p. 284, n. 5):

> "We of course do not pass judgment on the validity of the broad jurisdictional base asserted by the Commission in . . . the recently issued rules with respect to all CATV systems."

its authority to enter the CATV field, its syllogism being as follows (government's Br. 29):

1. Section 2 of the Communications Act (47 U.S.C. §152) states that the Act is applicable to "all interstate . . . communication by wire or radio . . . and to all persons engaged . . . in such communication."

2. Section 3(a) of the Communications Act (47 U.S.C. §153(a) defines "wire communication" or "communication by wire" as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." The Commission holds that CATV operations are clearly "communication by wire" within the above definition.[18]

3. Since CATV constitutes "communication by wire" and since Section 2 provides that the Act shall be applicable to all persons engaged in "communication by wire", the Commission can under Sections 4(i) and 303(f) and (r) of the Communications Act (47 U.S.C. §§ 154(i), 303(f) and 303(r)) promulgate such rules and regulations as are necessary to carry out the provisions of the Act, including Section 303(h) (47 U.S.C. § 303(h)) which authorizes the Commission to establish areas or

[18] The Commission also states (*Second Report and Order*, Appendix C, n. 1, A. 70) that it can be argued that CATV operations are also "radio communication" as defined in Section 3(b) of the Communications Act (47 U.S.C. § 153(b)). However, the *Second Report and Order* relied only upon Section 3(a) to justify Commission jurisdiction.

> zones to be served by stations and Section 307(b) (47 U.S.C. § 307(b)) which directs the Commission to make an equitable allocation of radio facilities amongst the several states and communities. It is the Commission's position that unfettered CATV operations interfere with the allocations which it has previously established pursuant to Section 303(h) and 307(b) of the Act and their operations must be regulated so that the purposes of Sections 303(h) and 307(b) are effectuated.

The argument distorts the basic structure of the Communications Act and ignores its legislative history. As has previously been pointed out, two disparate functions were transferred to the Federal Communications Commission when it was created by the Communications Act of 1934. One of its functions came from the Radio Act of 1927. Under that Act, the Federal Radio Commission performed essentially the same functions with respect to radio as the Federal Communications Commission is authorized to exercise under Title III of the Communications Act. This included the powers contained in Sections 4(i), 303(f), 303(h), 303(r) and 307(b) of the Communications Act. The Radio Act of 1927 contained a definition of "radio communication" in Section 31 (47 U.S.C. § 111) which is essentially the same as Section 3(b) now contained in the Communications Act. However, the Radio Act of 1927 contained no definition of "communication by wire" similar to Section 3(a) upon which the Commission now relies. It is thus clear that had the Federal Radio Commission attempted to promulgate rules and regulations under the Radio Act of 1927 regulating CATV activities, it could have found no statutory basis for such conduct; at least the Federal Radio Commission could not have

relied upon the statutory basis which the Federal Communications Commission chooses.

The presence of Sections 2(a) and 3(a) in the Communications Act does not enable the Commission to use Title III powers with respect to non-carriers. Section 3(a) is derived from Section 1(3) of the Interstate Commerce Act (41 Stat. 475) which related only to activities of common carriers. It has the same purpose in the Communications Act. It is true that Section 2(a) declares that the provisions of the Communications Act shall apply to *all* interstate and foreign communication by wire. However, contrary to the implications of the Commission's position this does not mean that *all* provisions of the Communications Act are applicable to *all* interstate communication by wire. On the contrary, it is quite clear from a study of Title II that its provisions are applicable to interstate communication by wire only when common carriers are involved and the complete silence of Title III as to communication by wire evinces a design to exclude such activity from the operation of Title III. This, however, does not mean that there are no provisions of the Communications Act which are applicable to non-common carrier communications by wire. For example, Section 605 in Title VI is applicable to all interstate communication by wire whether or not common carriers are involved.

The foregoing is a reasonable reading of the various provisions of the Communications Act. The Commission's position is strained. If its point of view were accepted, it would mean, for example, that the Commission could exercise Title III power over Muzak operations—i.e., the business of furnishing music by wire to subscribers—or STV operations—the origina-

tion of television programs by an organization which distributes them by wire to subscribers.[14] Under the Commission's reasoning it could regulate such activities under Title III if it could find that they threatened the economic health of broadcast operations because such activities are clearly communications by wire within the meaning of Section 3(a) and are probably interstate in character.

The Muzak and STV analogies are no more far fetched than is Commission reliance upon Sections 2(a) and 3(a) for the purpose of jusitfying Commission regulation of CATV. The short answer is that Section 2(a) does not confer upon the Commission all of the power contained in the Communications Act. Consistent with the declaration of Section 2(a) communications by wire activities which are not common carrier in nature can be declared to be not within the ambit of Commission regulatory power and still be subject to other provisions of the Communications Act —e.g. Section 605.

The clear intent of the Communications Act is underscored by its legislative history. The Senate Committee Report (Senate Report No. 781, 73rd Cong.) accompanying the report of that bill to the Senate, set forth (p. 3) that Title II for the most part "follows the provisions of the Interstate Commerce Act now applicable to communications or adapts some provisions of that Act now applicable only to transportation." As to Title III, it stated that it (p. 6):

> "... consists of the Radio Act of 1927 written to bring into a single title effective provisions of that

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[14] See *Weaver* v. *Jordan*, 49 Cal. Rptr. 537, 411 P. 2d 289 (1966), *cert. denied*, 385 U.S. 844 (1966).

> Act and its several amendments. The language has been changed in minor respects to conform to the terms and definitions in the remainder of the bill." [15]

The Conference Committee, in resolving the differences between the two bills, stated as to Title III (Conference Report on Communications Act of 1934, House Report No. 1918, 73rd Cong., p. 47):

> "The Senate bill abolishes the Federal Radio Commission, and repeals the Radio Act of 1927, but in effect reenacts it in Title III, eliminating certain matter no longer effective, and adding certain provisions, most of which are taken from H.R. 7716, 72nd Congress, which passed both houses but was pocket vetoed. Title III of the House bill abolishes the Federal Radio Commission but transfers its functions under the Radio Act of 1927 to the new Commission. Title III of the substitute adopts the provisions of the Senate bill, except that most of the changes from existing law which were not contained in H.R. 7716 have been omitted."

It is thus clear that when Congress enacted the Communications Act it manifestly intended the Federal Communications Commission to perform under Title II of the Act those functions which were formerly performed by the Interstate Commerce Commission under its Act and its Title III functions were to be those which had been performed by the Federal Radio Commission under the Radio Act of 1927. There is

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[15] In the House bill the Senate language with respect to the purpose of Title II is repeated (House Report No. 1850, 73rd Cong., p. 5). Title III as it appeared in the House bill consisted of a single section which abolished the Federal Radio Commission and transferred its functions under the Radio Act of 1927 to the Federal Communications Commission.

not a single word in the legislative history which indicated that the Federal Communications Commission was intended to be given Title III functions with respect to communication by wire. Commission reliance on Sections 2(a) and 3(a) for assertion of Title III powers over CATV is therefore without foundation.

Nor can the Commission's CATV rules be justified by reference to Section 3(b) of the Communications Act containing a definition of "radio communication". The short answer to any such argument is that the Commission has expressly declined to bottom its jurisdiction on that statutory ground; it cannot attempt to do so for the first time in this Court. *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194 (1947). But the objection to such an assertion of jurisdiction by the Commission is more fundamental than reliance upon *Chenery*. As is readily apparent from the description of CATV operation, it is a reception service and not a radio transmission service. The whole thrust of the Radio Act of 1927 and Title III of the Communications Act of 1934 was to confer on the Federal Radio Commission and the Federal Communications Commission authority over transmission aspects of radio communication but not over reception. Section 301 of the Communications Act (47 U.S.C. § 301) defining the scope of Title III of the Communications Act, makes this abundantly clear when it states:

> "It is the purpose of this Act, among other things, to maintain the control of the United States over all channels of interstate and foreign *radio transmission,* and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority. . . . (emphasis added)"

The reason for this concern is quite simple; it is found in the history of radio regulation prior to the Radio Act of 1927. An excellent summary of the conditions which made that Act necessary is set forth in *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 210-213 (1943). That opinion makes it clear that the Radio Act of 1927 was necessary because previous authority was inadequate to deal with the subject of radio transmission. Radio regulation began with a simple statute, the Wireless Ship Act of 1910, 36 Stat. 629, Chapter 379. That Act required certain vessels to be equipped with apparatus for radio communication. In 1912, Congress enacted the Radio Act of 1912 (37 Stat. 302, Chapter 287) which required the operation of such apparatus to be conducted pursuant to a license from the Secretary of Commerce. No additional legislation was enacted until 1927. In the interim, broadcasting appeared on the scene and the demand for frequencies mushroomed. The existing legislation was inadequate to prevent the Secretary of Commerce from denying licenses to qualified applicants merely because interference would be caused to other stations or to permit him to confine a licensee to the frequency originally assigned him. Under the old law, once an applicant was assigned a frequency he was free to shift to another one if he liked it better. The inevitable result was chaos in the spectrum. The Radio Act of 1927 was passed to relieve this chaos by creating adequate authority over radio transmission. This is the authority which was granted to the Federal Radio Commission by the Radio Act of 1927 and this was the authority which Title III of the Communications Act gave to the Federal Communications Commission.

There is nothing in any of the specific statutory provisions relied upon by the Commission as the basis for its authority which indicates that the Commission's Title III authority extended to anything but regulation of transmission. Sections 4(i) and 303(r) give the Commission broad rule making authority to carry out the provisions of the Act. In and of themselves, they confer no independent power; they are dependent upon other substantive provisions. As this Court stated in *Regents of Georgia* v. *Carroll*, 338 U.S. 586, 600 (1950):

> "Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power. It is in connection with this power that Section 303(r) is to be interpreted."

Section 303(f) authorizes the Commission to promulgate rules and regulations designed to prevent interference among stations. This section clearly relates to transmission alone. There is nothing whatsoever in the activities of CATV that directly or indirectly causes any interference among stations and the Commission does not claim that such is the case.[16] Section 303(h) authorizes the Commission to establish areas or zones to be served by stations. Again, the subject matter is clearly transmission. Without such authority it could be argued that the Commission lacked power to permit some stations to use relatively little power and other stations to use maximum power. Also without such a provision existing radio stations in opera-

[16] CATV systems like other wire services and radio and television receivers do emit a certain amount of radiation which can cause interference to radio service. In this aspect of their operations they are miniature transmitters and are subject to FCC jurisdiction. The Commission has promulgated Part 15 of its Rules to govern the transmission by such devices.

tion could justifiably argue that no new station causing any interference to such operation could be granted without a hearing since such interference would constitute a modification of license. However, since the Commission under Section 303(h) is authorized to prescribe the areas or zones to be served by a station, it is clear that once the Commission exercises this authority, existing stations cannot complain with respect to licensing of new stations which cause interference in an area outside that prescribed as the area served by that station.[17]

The last section relied upon by the Commission is Section 307(b). This section reads as follows:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio services to each of the same."

By its terms the operation of this section is confined to transmission. It directs the Commission, when it considers applications for licenses and modifications and renewals thereof, to provide a fair, efficient and equitable distribution of radio services to the several communities. In other words, Section 307(b) makes it clear that when conflicting demands exist for frequencies, the Commission is required to make an equitable allocation among the several communities.

The legislative history of Sections 303(h) and 307(b) confirms the Congressional purpose in confer-

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[17] Cf. *FCC* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239 (1943).

ring power only over transmission. These sections came to Title III from the Radio Act of 1927. In the course of the hearings held during 1926 before the House Committee on Merchant Marine and Fisheries on one of the bills (H.R. 5589, 69th Cong.) which later became the Radio Act of 1927, Stephen B. Davis, Solicitor of Commerce, explained to the Committee the provisions of this bill. In the course of this explanation, the following colloquy took place (pp. 130-131):

> "Mr. Briggs: It would not be the policy of your department to in any way allow any discrimination against the small independent broadcast stations in favor of the big, high powered stations?
>
> "Mr. Davis: Absolutely not. We recognize that there are, you may say, two very distinct fields in radio—there is the very broad national field, or, at least, the field covering large zones, or districts, where obviously, in order to give the proper service, you must have powerful stations. There is, at the same time, the field for the local station, the station which only aims to take care of the radio service within a limited zone. Both are equally important and both will receive like protection."

Subsequently, in the debate on the House floor on H.R. 9971, (a later version of H.R. 5589), Congressman White of Maine, who introduced both H.R. 5589 and H.R. 9971, cast further light on Congressional purpose (67 Cong. Rec. 5479):

> "Existing law gives the Secretary no control over the location of stations. The result has been an unjustifiable grouping of stations within limited areas. There are within 50 miles of Chicago 40 stations, of New York 38, of Philadelphia 22. Stations so centered detract from the value of each other and interfere with the highest quality of

service. In the bill before you the Secretary is given authority in passing upon a license to consider its proposed location and the area to be served thereby, and he is enjoined to effect an equitable geographic distribution of stations over the entire country."

From the foregoing, it is clear both as a matter of construction of the plain words of the statute and a study of the legislative history that Congress intended to restrict Commission authority under Title III to regulation of transmission, not reception. Prior to the instant incursion by the Commission into the CATV field, the Commission itself has been forthright in denying its jurisdiction over reception matters. Only eight years ago it disclaimed jurisdiction over CATV. *Inquiry Into Impact of CATV,* 18 Pike & Fischer RR 1573 (1959). Moreover, in 1962, Congress passed the All Channel Receiver Law, P.L. 87-529, 76 Stat. 150 (1962) which added Sections 303(s) and 330 to the Communications Act. These provisions authorized the Commission to require that any television receiving apparatus shipped in interstate commerce be capable of receiving all frequencies allocated by the Commission to television broadcasting. This is the first instance where Congress included in Title III authority with respect to reception facilities. By the same logic which the present Commission utilizes to argue that Sections 303(h) and 307(b) authorize it to regulate reception facilities involved in CATV, it could have argued in 1962 that Section 303(g) of the Communications Act (47 U.S.C. § 303(g)) enabled it under Title III to control the subject of all-channel receivers without the necessity of enabling legislation. Section 303 (g) authorizes the Commission to promote the larger and more effective use of radio in the public interest.

One can hear the argument made by the present Commission that the usefulness of UHF—certainly a large and important part of the radio spectrum which should be utilized in the public interest—was being undermined by the fact that many receivers being shipped in interstate commerce were not equipped to receive UHF and hence, a large part of the television spectrum was lying fallow. Television receivers are as much an instrumentality of communication by radio as is CATV and could by the logic utilized in this case be subjected to Commission control without legislation. However, the Commission at that time recognized that its authority over reception devices was inadequate, and in requesting the All Channel Receiver Law, the Commission candidly stated to the Congress (Hearings on H.R. 8031 before the House Committee on Interstate and Foreign Commerce, 87th Cong., pp. 7-8 (1962)):

> "In the Communications Act of 1934, Congress vested the Federal Communications Commission with the responsibility of making available to all people of the United States, an efficient and nationwide communications service, and certain authority to carry out these responsibilities. Our request for this legislation is an expression of our feeling that in the area of television reception systems, our present authority is not commensurate with our responsibilities. . . ."

The Congress obviously agreed with the Commission as to lack of authority over reception for it proceeded to enact the All Channel Receiver Law rather than advising the Commission that it had the authority under then existing law to deal with the subject.

The Commission was obviously right in 1962 in asking Congress for a specific grant of authority to deal

with the subject of reception. The Commission has requested the Congress on several occasions to give it authority to deal with the subject of CATV.[18] To date, Congress has refused to do so. Yet now, the Commission by its own *ipse dixit* says that such Congressional authority is not necessary; it has ample authority under Title III of the Communications Act to deal with the subject of CATV. This is a straight usurpation of authority.

II.

THERE IS NO STATUTORY AUTHORITY FOR THE SPECIFIC CATV REGULATIONS ADOPTED BY THE COMMISSION

A. Description of the Rules

The specific CATV rules and regulations which are involved in this proceeding are Sections 74.1105, 74.1107 and 74.1109.[19] Rule 74.1109 will be dealt with separately under Point III. Rules 74.1105 and 74.1107 prescribe a detailed procedure which must be adhered to by all CATV systems, "existing" as well as "new". The dividing line between "existing" and "new" depends on whether or not the system was in operation on February 15, 1966—the date upon which the Com-

[18] For the latest instance see H.R. 13286 and S. 3017, both 89th Cong. See also H.R. 11041 and S. 2653, both 86th Cong.

[19] There are also other CATV regulations governing such subjects as the television stations which must be carried by CATV systems, those which the CATV systems are forbidden to carry; and the non-duplication protection which CATV systems must accord to local stations as against distant stations. Black Hills has argued in its Eighth Circuit case that these regulations are invalid because they lack statutory authority and contravene the provisions of the First Amendment to the Constitution. These other regulations are not specifically involved in the instant case.

mission announced its intention to adopt specific rules and regulations governing all CATV systems. These rules and regulations were adopted and issued in March, 1966 as part of the *Second Report and Order*.

So far as new CATV systems are concerned, Rules 74.1105 and 74.1107 provide that before any such system can commence operation it must serve notice at least 30 days before it expects to commence operation on (1) the Federal Communications Commission; (2) all television stations within whose predicted Grade B contour the system will operate, (3) all 100-watt translators operating in the community where the CATV system will operate, and (4) the Superintendent of Schools in the community and county in which the system will operate and the local, area and state educational television agencies—in those situations where the CATV system proposes to carry distant non-commercial educational television stations.

As a minimum matter, the CATV system is prohibited from commencing operation during this 30-day period. But that is not all. If the CATV system operates within the predicted Grade A contour of any television station located in one of the top 100 television markets as defined by ARB (a private organization), the CATV system is not allowed to commence operation so far as importation of distant signals is concerned until it obtains formal FCC permission for that purpose either by going through a full evidentiary hearing or obtaining a waiver of such a hearing as the result of a detailed showing in a petition as to why the public interest would be served by dispensing with a hearing. Even in the case of non top 100 markets or in the case of Grade B signals for top 100 market stations, any party in interest may during the 30-day

waiting period file a written objection to the proposed operation. The filing of such an objection, no matter how frivolous or unsubstantiated, automatically prevents the CATV system from commencing operation until after the Federal Communications Commission enters a formal order disposing of the objection and giving its permission for the operation. The Commission may enter such an order on the basis of the pleadings or may set the matter for hearing.

So far as existing CATV systems are concerned, Rule 74.1105(d) purports to give them grandfather rights so that no new FCC authorization is necessary for existing systems to continue their existing operation. However, if any existing system desires to add a new distant signal, it must go through the same procedure as does a new system:—30 days' notice and a hearing or waiver if a top 100 market situation is involved or for a non 100 market situation, a 30-day pause plus an automatic stay if an objection is filed.

B. The Rules Prescribe a Licensing System Without Statutory Authority

The Commission procedure is the equivalent of a licensing system. The essence of a licensing system is the need of government permission before an activity is commenced. It is not important that the Commissions's rules and regulations do not contain the word "license"; it is the effect of the rules which governs. Normally, a person may enter a business activity merely by starting operation. In the case of CATV, however, the Commission's rules prescribe detailed procedures which must be adhered to in order to qualify for the right to operate. The procedure is not only time consuming; it is not automatic. The right to com-

mence operation at all depends upon the CATV system saitsfying the Commission's procedure. This is licensing pure and simple. Section 2(e) of the Administrative Procedure Act, 5 U.S.C. § 1001(e) recognizes that labels are not controlling when it defines "license" or "licensing" as follows:

> "'License' includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license."

The necessity of having to operate a business pursuant to governmental permission is not lightly to be presumed. *Cf. Bantam Books Inc.* v. *Sullivan,* 372 U.S. 58 (1963). Normally, a person is free to enter any business he chooses without obtaining prior permission from the Federal Government. Indeed, when the business is associated with the communications media, a licensing system is contrary to the First Amendment to the Constitution unless there are unique conditions such as those which obtain in radio where there would be only chaos without licensing, so that the very existence of the licensing is a *sine qua non* to the existence of the medium at all. *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Company,* 289 U.S. 266 (1933); *National Broadcasting Company* v. *U.S.,* 319 U.S. 190 (1943).

In the case of radio, Congress did not leave any room for doubt as to its intentions concerning licensing. It specifically set forth in Section 301 the directive

that operation of radio apparatus for the purpose of radio transmission shall be only "under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." Moreover, it established detailed statutory standards and procedures governing the granting and denying of such licenses.[20]

No such provision is contained in the Act with respect to CATV. The statute gives the Commission no authority to prescribe a licensing system and does not set forth standards to govern such licenses or the procedure to be followed in acting upon applications for such a license. The Commission has arrogated to itself a function which Congress has withheld from it. Its rules establish a licensing system and establish a procedure in acting upon applications for such license which reserve to it full flexibility as to the procedure it should follow. Thus, while in the case of broadcast licenses, even Congress has not required the Commission to order an automatic evidentiary hearing in every single instance, the Commission on the face of its rules has decreed that a hearing is required in every single instance of top 100 market applications. But it then reserves the right to waive even this hard and fast procedure. Moreover, while Congress has specifically provided that no applica-

[20] Even in Title II common carrier matters (where no First Amendment problem is present) the Congress was very explicit when it desired prior government approval for an activity. Thus in Section 214 (47 U.S.C. § 214) it specifically provided that "[n]o carrier shall undertake the construction of a new line or of an extension of any line . . . unless and until there shall first have been obtained from the Commission a certificate. . . ." Detailed provisions are contained in the statute governing the manner in which the Commission shall exercise its authority.

tion for a radio station license should be denied without a full hearing, the Commission, in the case of CATV, has not bound itself to accord any hearing rights to the CATV applicant. Finally, Congress in the case of radio authorization has provided that no license may be modified or revoked without a hearing. The Commission in the CATV field recognizes no such limitations. It has without hearing or formal procedure purported to terminate the authority of CATV systems which commenced operation between February 15, 1966 and March 17, 1966—the date of publication in the Federal Register and the earliest date upon which the CATV rules became effective. Before March 17, 1966 such operation was legal in all respects—even the Commission does not contest the point. After March 17, 1966 the Commission by *ipse dixit* has declared continued operation illegal. The Commission has even purported to exercise such authority—again without a hearing—with respect to the continued carriage of Grade B signals even where the initiation of such carriage was pursuant to an earlier finding by the Commission that the carriage was consistent with Commission rules. *Buckeye Cablevision, Inc.*, 11 Pike & Fischer RR 2d 885 (1967).

Black Hills is not seeking "due process" procedure for CATV applications. The error of the Commission's action would not be cured by a complicated hearing procedure. The point is that the absence of a statutory procedure is indicative of Congressional purpose. The answer is clear. When Congress desired the Commission to have licensing authority, it said so clearly and unequivocally and provided the standards and procedure to govern its action. It has not done so in the case of CATV.

III.

RULE 74.1109 IS AN ADMINISTRATIVE MONSTROSITY

Rule 74.1109 provides that not withstanding any other provision of the rules, the Commission may upon the request of any interested person "waive any provision of the rules relating to distribution of television broadcast signals by CATV systems" or "impose additional or different requirements." This special procedure is invoked by the filing of a formal complaint or informal letter to which the affected parties may file responsive pleadings. The Commission reserves to itself the right to grant or deny the relief requested with or without a hearing and if a hearing is ordered, to provide for interim relief on the basis of the pleadings.

To the extent that Rule 74.1109 is part and parcel of the licensing system which the Commission has prescribed for CATV operations, it is subject to all of the defects already discussed under Points I and II. However, there is an independent ground for invalidating this rule. It is a veritable freak in the field of administrative law. If the Commission has the power to adopt a rule like 74.1109, the requirements of rule making become meaningless.

As has already been pointed out the Commission in purported compliance with Section 4 of the Administrative Procedure Act and Sections 4(i), 303(f) and (r) of the Communications Act has promulgated detailed rules and regulations governing the operation of CATV systems. One of these rules is 74.1103 which permits, indeed compels, all CATV systems to carry all Grade B signals. Yet pursuant to a request for special relief filed under Rule 74.1109 the Commission has by

interim order in the instant case directed CATV systems to discontinue the carriage of Grade B signals. It did this by reference not to any rule or prescribed standard but pursuant to a vague suggestion in Footnote 69 to the *Second Report and Order* (A. 62) which stated that in rare instances special relief might be required when two or more markets each fall within one another's Grade B contour.[21]

In a recent case—*Vision Cable Company of Rhode Island, Inc.*, 11 Pike & Fischer RR 2d 1096 (1967)—the Commission has pushed its exercise of power to even more extreme limits. In that case the CATV company proposed to initiate service in several Rhode Island communities and to carry on the systems the Grade A signals of the Providence stations and also both Grade A and Grade B signals from Boston and Worcester stations. A Providence television station filed a Petition for Special Relief under Rule 74.1109 asking the Commission to forbid the CATV systems from carrying the television signals of Boston and Worcester stations, Grade A as well as Grade B. The only justification for the relief, as stated in the Commission's opinion, is that the television station "at-

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[21] The full text of Footnote 69 reads as follows:

"If two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise."

tempts to demonstrate that, in the areas where Vision Cable proposes to carry the signal of the Boston or Worcester stations, these stations provide predicted signals 'substantially inferior' to the predicted signal which would be provided by proposed UHF Station WNET, Providence." (*id.* at 1098). Station WNET is a non-operating station. It had formerly been on the air but had discontinued operations a long time ago because of economic difficulties. Recently it indicated to the Commission that it intended to return to the air. The Commission felt that the CATV operations could have an effect on WNET's ability to operate. Despite the absence of any rule which would be controverted by the proposed CATV operations (even Footnote 69 does not refer to the overlap of Grade A signals), the Commission issued an interim order summarily ordering Vision Cable to refrain from carrying the Boston and Worcester signals—Grade A as well as Grade B.

The Commission's Rule 74.1109 activities are not limited to Footnote 69 cases. Another instance involved Rule 74.1103. This rule requires CATV systems to provide black-out protection for certain duplicated programs but only where the duplicating program from the distant station is broadcast on the same day as that on which it is broadcast by the protected station. A predecessor rule which was applicable only to microwave-fed systems provided such non-duplication protection if the duplicating programs were broadcast during a 30-day period beginning 15 days before and ending 15 days after the same program was broadcast by the protected station. The Commission had proposed the same rule in its *Notice of Proposed Rule Making* with respect to all CATV sys-

tems. However, after considering the comments filed in the rule making proceeding the Commission in its *Second Report and Order* confined the black-out protection to same day duplication (A. 23-26, 116-118). In *Northern Microwave Service, Inc.*,[22] the Commission had before it CATV systems in northern Maine which had commenced operation at various dates ranging from 1961 to 1965. They carried signals not only from United States television stations but also from Canadian television stations. Canadian television stations originate their own programs and also carry some programs originated by the United States networks. In some cases United States network programs appear on Canadian stations before they are available to the United States television stations. In the cited case, the United States television stations filed a Petition under Rule 74.1109 seeking as special relief a directive that the CATV systems black-out the United States network programs appearing on Canadian stations before they are available to United States stations. The Commission so ordered. There is no substantive provision in any Commission rule providing for such a result. Indeed, the Commission had specifically refused to add such a provision to its Rules preferring instead to retain the unlimited discretion which Rule 74.1109 purportedly gives to it (A. 117-118).

Black Hills has called these cases to the Court's attention not for purposes of seeking a ruling as to the propriety of Commission action in those cases but

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[22] 9 Pike & Fischer RR 2d 647 (1967), *rev'd sub nom. Presque Isle TV Co., Inc.* v. *FCC*, — F. 2d —, 11 Pike & Fischer RR 2d 2072 (1st Cir. 1967).

to illustrate by very concrete examples the nature of the power which the Commission claims to possess pursuant to Rule 74.1109. There is no aspect of CATV operation which lies beyond the ambit of Rule 74.1109. For example, if the Commission's position is correct, it can change the grandfather date of existing systems, it can control the signals that are carried, it can alter the non-duplication protection which must be accorded, etc. Such an assertion of unbridled power makes a mockery of the whole system of administrative law. What need is there to have any detailed rules and regulations if the Commission can promulgate Rule 74.1109? Under the Commission's reasoning it could adopt a very simple rule merely stating that all CATV operation is prohibited except in accordance with such requirements as the Commission may deem to be appropriate on a case-by-case determination on the basis of petitions filed with it by interested persons. All the other Rules are mere window dressing. If the Congress attempted to delegate authority to the Commission to regulate an industry on the basis of such vague standards, serious constitutional questions concerning delegated power would be raised. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935). Yet that is precisely the type of power which the Commission has attempted to arrogate to itself.

The Congress was very careful in the Communications Act to impose specific standards governing the Commission's conduct and to provide procedural protection to private persons dealing with the Commission. No bestowal of authority in the CATV field has been granted to the Commission by Congress. The Commission deduces from this silence not the usual message, namely, an absence of authority, but rather

the conferring upon it of the power to act in any manner it chooses without standards or procedural safeguards.

CONCLUSION

For the foregoing reasons, it is urged that the judgment of the Court below be affirmed.

Respectfully submitted,

WAYNE W. OWEN
Union Life Building
Little Rock, Arkansas 72201

HARRY M. PLOTKIN
GEORGE H. SHAPIRO
1815 H Street, N. W.
Washington, D. C. 20006

Attorneys for Amicus Curiae Black Hills Video Corporation and Midwest Video Corporation

Of Counsel:

MOSES, MCCLELLAN, ARNOLD,
OWEN & MCDERMOTT
Union Life Building
Little Rock, Arkansas 72201

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N. W.
Washington, D. C. 20006

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Supreme Court of the United States

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UNITED STATES OF AMERICA
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for the Ninth Circuit

BRIEF FOR RESPONDENTS MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP.

Of Counsel:
FLETCHER, HEALD, ROWELL,
KENEHAN & HILDRETH,
1023 Munsey Building
Washington, D.C. 20004

FRANK U. FLETCHER
ROBERT L. HEALD
EDWARD F. KENEHAN
JAMES P. RILEY
Attorneys for Respondents

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BRIEF FOR RESPONDENTS MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (A. 184-193)[1] is reported at 378 F. 2d 118. The

1 "A." refers to the printed appendix filed in this Court under Rule 36(1).

Memorandum Opinion and Order of the Federal Communications Commission (A. 146-179) is reported at 4 FCC 2d 612, 8 Pike & Fischer, R.R. 2d 278 (1966).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 28, 1967 (A. 194). A petition for a writ of certiorari was filed by the United States on July 13, 1967 (Case No. 363) and by Midwest Television *et al.* (Case No. 428) on July 27, 1967. Certiorari was granted in both cases on October 23, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1964) and 28 U.S.C.A. §2350 (1966 Supp.).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has jurisdiction to regulate non-microwave community antenna television (CATV) systems.

2. If it has, whether in the exercise of such jurisdiction the Commission has power to issue an interim order maintaining the *status quo* pending a hearing to determine the impact on local "free" television of distribution by a CATV system of television signals from other areas of the country.

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(e), 4(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b) of The Communications

Act of 1934, 48 STAT. 1064, as amended, 47 U.S.C.A. §§151, 152(a), 153(a), 153(e), 154(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b), are set forth in the Appendix to Petitioner FCC's Brief, pp. 57-61. Sections 309(a), 309(e), 312(a), 401, 501, and 502 of the Act, 48 Stat. 1064, as amended, 47 U.S.C.A. §§309, 312(a), 401, 501, and 502 are set forth in the Appendix to this Brief.

COUNTER-STATEMENT OF THE CASE

Respondents, Mission Cable TV, Inc., and Pacific Video Cable Co., are the owners of community antenna television systems (CATV)[2] in the San Diego, California, area. Respondent, Trans-Video Corp., is the majority owner of Mission Cable TV, Inc., and the sole owner of Pacific Video Cable Co. In addition, Trans-Video Corp. is the operator of the systems owned by Mission and Pacific.[3] Mission and Pacific began operating prior to February 15, 1966, under authority of franchises issued by the Cities of San Diego, Chula Vista, La Mesa, El Cajon and the County of San Diego.

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[2] A CATV system is an enterprise which receives television signals transmitted by television broadcast stations (either directly off-the-air or by means of a radio microwave relay), amplifies these signals and distributes them through a system of cables to subscribers who pay a charge for this service. In this case, Petitioners' systems use off-the-air pickups only.

[3] Trans-Video Corporation, successor to Trans-Video Corp., is now the sole owner of Mission Cable TV, Inc. and Pacific Video Cable Co. This change occurred subsequent to the date of the decision in the lower court but does not affect the standing of the parties or the merits of the case.

On April 23, 1965, the Commission issued its First Report and Order in Dockets No. 14895 and 15233 (30 F.R. 6038; 38 F.C.C. 683; 4 Pike & Fischer, R.R. 2d 1725) in which it adopted rules covering the operations of common-carrier microwave stations to relay signals to CATV systems. These rules, in reality, apply to and control the operation of CATV systems which receive signals via microwave.[4] At the same time, the Commission issued a Notice of Inquiry and Proposed Rule-Making in Docket No. 15971 (30 F.R. 6078; 4 Pike & Fischer, R.R. 2d 1679) concerning the adoption of rules to control the operation of all CATV systems.

On February 15, 1966, the Commission issued a press release announcing that it planned to adopt new rules to regulate all CATV systems. These rules were not adopted until March 4, 1966, and were not released to the public until March 8, 1966. They were published in the Federal Register on March 17, 1966, as the *Second Report and Order* in Dockets 14895, 15233 and 15791 (31 F.R. 4540; 2 F.C.C. 2d 725; 6 Pike & Fischer, R.R. 2d 1717; A. 1-96). In the Second Report and Order, the Commission for the first time adopted rules to regulate CATV systems which received signals directly off-the-air from television broadcast stations. In essence, the new rules are purportedly designed to protect and foster the development of local UHF television broadcast service. The Commission was concerned that the increased variety of signals available on CATV systems might reduce the available audience and revenues for local television broadcast stations by "fragmentation" of audience. To prevent this purported evil, the new rules provide that CATV systems

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[4] See, *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963), *cert. denied*, 375 U.S. 951 (1963).

must carry local stations and nearby stations in accordance with a system of priorities based upon signal strength. They also provide that a local television station may prevent the CATV system from carrying, on the same day, the signal of a non-local station which duplicates the programs of the local station. In addition, the new rules provide that no CATV system in the top 100 markets, as defined by ARB,[5] may extend any "distant signal" beyond the Grade B contour of the originating station without Commission approval after a hearing. Finally, the rules provide that the Commission may impose other limitations upon CATV systems if required to protect the "public interest."

The rule prohibiting carriage of distant signals was made effective on February 15, 1966 (the date of a press release), despite the fact that these rules were not adopted until March 4, 1966, were not released to the public until March 8, 1966, and were not published in the Federal Register until March 17, 1966. CATV systems in operation and delivering distant signals on February 15, 1966, were accorded "grandfather" rights and were permitted to continue carriage of distant signals.

On March 17, 1966, Petitioner, Midwest Television, Inc., licensee of VHF television station KFMB-TV, San Diego, California, filed a "Petition for Immediate Temporary and/or Permanent Relief Against Extensions of Service of CATV Systems Carrying Signals of Los Angeles Stations into the San Diego Area," naming Respondents, among others, as respondents. A supplement to the petition was filed on April 4, 1966.

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[5] The American Research Bureau is a private organization engaged in the business of producing and selling television market data and research surveys concerning television viewing habits.

On April 18, 1966, Respondents filed an opposition to the Midwest petitions. Midwest, in turn, filed a reply on April 25, 1966, to the Opposition to the Motion for Temporary Relief, and on May 3, 1966, filed a reply to the Opposition for Permanent Relief. Various pleadings were filed by other respondents in the proceeding.

On May 31, 1966, Respondents filed a "Supplement to 'Opposition to Petition and Supplement to Petition for Immediate Temporary and for Permanent Relief Against Extensions of Service of CATV systems Carrying Signals of Los Angeles Stations into the San Diego Area' " and, on July 25, 1966, the Commission released the Memorandum Opinion and Order which was reviewed by the court below (A. 146-179). In it, the Commission concedes that Respondents' CATV systems are not operating in violation of any of the new CATV rules. It then concluded that, in accordance with the statement in the Second Report and Order, the San Diego situation was a special case which the Commission would investigate and consider on an *ad hoc* basis to determine if any new and additional requirement or limitation should be placed upon CATV systems operating under these circumstances (A. 164-165). It then designated the matter for hearing in an adversary proceeding on a series of broad issues which, in fact, constituted a further rule-making proceeding, to determine the extent of CATV penetration in San Diego, and the effect of CATV operations on local television stations in that market (A. 172-173).

The Commission then went on to determine the nature of the temporary relief to be afforded to Petitioner, Midwest Television, Inc. It ruled that pending final disposition of this proceeding, it would order Respondent Mission to confine delivery ". . . of the Los Angeles signals carried on its systems to subscribers within those areas where Mission . . . was

operating on February 15 , 1966." In addition, it ruled that Mission could continue its present service to persons who began receiving service and to those who signed subscription requests between the date of February 15, 1966, and the date of the Order. The Commission pointed out that Respondents could continue to construct lines and add new subscribers within these franchised areas ". . . *so long as the expansion is confined to the carriage of the San Diego-Tijuana signals.*" (Emphasis supplied) (A. 170-172, 174). This language clearly demonstrates that the stay was in stark reality a final government sanction prohibiting the dissemination of certain television programs to the public of the San Diego area, for an indefinite period of time.

On August 10, 1966, Respondents filed a Petition for Review and a Petition for Stay Pendente Lite in the court below. After hearing, the court, on August 23, 1966, issued a partial stay of the Commission's Order, allowing Respondents to add new subscribers to their trunk and feeder lines in existence on August 23, 1966.

On April 28, 1967, the court below issued the opinion now under review by this Court. The Court of Appeals concluded and held that Sections 4(i) and 303(r) of The Communications Act of 1934, as amended,[6] the sources of power relied on by the Commission, do not authorize the Commission to temporarily restrain or limit Respondents' delivery of Los Angeles television stations to their customers in the San Diego area.

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[6] 48 STAT. 1066, 47 U.S.C.A. §154(i) (1962); 50 STAT. 191, 47 U.S.C.A. 303(r) (1962). In the paragraphs that follow, references to sections of The Communications Act are not specifically related to the United States Code. It should be noted, however, that Sections 1 through 4 of the Act are Sections 151 through 154 of the Code and all other sections are identically numbered in both the Act and the Code.

Beginning in December of 1966, The Commission's evidentiary hearing was held and on October 3, 1967, the Examiner released his Initial Decision which announced, among others, his conclusions that there ". . . is no evidence that CATV produced competition to date has any effect whatsoever on the service offered the public by the San Diego television stations . . ."; that ". . . CATV expansion will have no material effect on the operation of San Diego's network-affiliated stations . . ."; that its probable effect on ". . . prospective and proposed UHF stations is unproven . . ."; and that ". . . there is no basis for the imposition of any restrictions on the present or future operation of CATV systems in the San Diego market." (*Midwest Television, Inc.*, 11 Pike & Fischer, R.R. 2d 273, 303, 304).

SUMMARY OF ARGUMENT

I.

THE FEDERAL COMMUNICATIONS COMMISSION LACKS JURISDICTION TO REGULATE CATV SYSTEMS

A. The Commission's authority is precisely defined and clearly limited by The Communications Act of 1934, as amended, and unless Title II or Title III of that Act provides the necessary authority, it does not exist. The Commission has conceded that CATV systems should not be regulated as common carriers within the meaning of Title II of the Act. See, *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 123 U.S. App. D.C. 298, 359 F. 2d 282 (1966). On the other hand, except for special and specific statutory

authorizations, all of the provisions of Title III of The Communications Act have to do with, or are related to, the licensing of radio stations. Thus, insofar as non-common carrier communication functions are concerned, the Commission (unless otherwise specifically authorized by statute) is authorized only to license radio stations, and its rule making activities must be related to and based on this licensing authority. See, *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 94 L. Ed. 363 (1950). While Section 2(a) of The Communications Act applies ". . . to all interstate . . . communication by wire or radio . . .", this has no bearing on the Commission's authority to regulate CATV systems, even though such systems are determined to be "interstate communication," since none of the Act's provisions cover such systems. CATV systems do not require licenses within the meaning of Title III of The Communications Act, and they are not common carriers within the meaning of Title II. Accordingly, any rules adopted by the Commission looking to the regulation of such systems are inconsistent with the Act and, therefore, unlawful.

B. The Commission does not have jurisdiction to regulate non-microwave CATV systems since the sole purpose of these new rules – elimination of competition – is beyond the powers conferred upon the Commission by Congress. The basic economic policy of the United States is to promote free and competitive business enterprise. This policy, expressed in the anti-trust laws, can only be modified or eliminated by specific exemptions conferred by Congress. Congress did grant the Commission power to consider economic competition under Title II of The Communications Act insofar as the regulation of common carriers is

concerned. However, no such exemption was granted under Title III which is the basis for the present rules. It is clear that the decision of this Court in *Federal Communications Commission v. Sanders Bros. Radio Station,* 309 U.S. 470, 84 L. Ed. 869 (1940), does not hold that this power has been conferred upon the Commission. *Dictum* in that opinion has been relied on by the lower courts in holding that the Commission has the power to consider the effect of competition in licensing broadcast stations under the criterion "public interest, convenience, and necessity". It is submitted that this Court must clarify this *dictum* and state that its decision in *Sanders* holds that the Commission has no power to regulate competition from other legitimate business simply to protect UHF television stations.

II.

THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ISSUE A RESTRAINING ORDER IN ORDER TO MAINTAIN THE *STATUS QUO* PENDING THE OUTCOME OF A HEARING

Sections 4(i) and 303(r) of The Communications Act do not empower the Commission to issue an interim restraining order maintaining the *status quo* pending a hearing to determine the impact on local "free" television of CATV distributed television signals. The court below correctly concluded that if those sections did authorize such orders, ". . . the authority of Section 312 to issue cease and desist orders would be meaningless or repetitive." Petitioners' theory to the contrary would accord the Commission greater enforcement power with respect to broad, undefined responsibilities than it has with respect to its specifically defined

responsibilities. The only authorities relied on by Petitioners in support of their position are cases involving actions of two other government agencies, the Security and Exchange Commission and the Federal Power Commission. Those agencies, however, are governed by different statutes and their powers, functions, and responsibilities are quite different than the powers, functions and responsibilities of the Federal Communications Commission. The cases relied on, therefore, do not evidence the intent of Congress with respect to the power of the Commission.

Moreover, the facts presented in these cases are different. They do not stand for the proposition that the Commission has authority to summarily stay the legal activities of Respondents pending a hearing to determine whether a permanent stay should issue.

ARGUMENT

I.

THE FEDERAL COMMUNICATIONS COMMISSION LACKS JURISDICTION TO REGULATE CATV SYSTEMS

Introduction

The paramount question presented by this case is whether present legislation, *i.e.*, The Communications Act of 1934, as amended, 66 STAT. 1064 *et seq.*, 47 U.S.C.A. §§151 *et seq.* (1962), authorizes the Federal Communications Commission to regulate community antenna television, a business which does not engage in a common carrier

communications service, does not use the radio spectrum, and with respect to which there are no special statutory provisions. Petitioners concede that there are no particular statutory provisions covering CATV but contend that in enacting The Communications Act, and amendments thereto, Congress has delegated to the Commission powers that are so flexible, so comprehensive, and so expansive that particular legislation is not necessary. In essence, Petitioners argue that the Federal Communications Commission has the power and authority to take whatever action it deems appropriate in the interest of promoting and realizing ". . . the vast potentialities of radio."

Such a claim of power raises questions which go to the very roots of our system of government. It challenges the basic propriety of the First Amendment to the Constitution of the United States, the need for definitive legislation by Congress in any field regulated by an administrative agency, and the validity of past decisions of this Court. Respondents submit that present legislation does not give the Federal Communications Commission such broad, flexible, comprehensive and expansive powers. What Petitioners are asking is that this Court give the Commission such powers.

This Court, however, has already determined that present legislation cannot ". . . be interpreted as setting up a standard so indefinite as to confer an unlimited power. . ." even with respect to radio regulation. *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285, 77 L. Ed. 1166, 1178 (1933). Rather it has decreed that the "public convenience, interest or necessity" clauses of The Communications Act, the Act's "touchstone" (and obviously basic to the Commission's assertion of jurisdiction over CATV) ". . . is given meaning and contour by the other provisions of the statute and the subject matter with which it

deals." *Federal Communications Commission v. Sanders Bros. Radio Station,* 309 U.S. 470, 473, 84 L. Ed. 869, 872 (1940).

It is submitted that such power as the Federal Communications Commission possesses must be found spelled out within the four corners of The Communications Act. The Commission has not been given carte blanche authority by the Congress ". . . to promote and realize the vast potentialities of radio. . ." in any manner it sees fit. The means and extent of its promotional efforts are defined and limited by the statute and the power granted therein falls far short of authority to regulate CATV.

A. The Communications Act Does Not Give the Commission Jurisdiction To Regulate CATV Systems

While Petitioners repeatedly refer to the "comprehensive," "sweeping," "flexible" and "expansive" statutory power and authority of the Federal Communications Commission in arguing that The Communications Act of 1934, as amended, confers jurisdiction on the Commission to regulate CATV systems, there is no doubt but that basic reliance is placed on Section 2(a) which they contend subjects CATV to certain other general regulatory provisions contained in the Act. Accordingly, an analysis of Section 2(a) and other pertinent sections of The Communications Act of 1934 is required.

Under The Communications Act, the Federal Communications Commission has two principal and separate functions. On the one hand, it is a regulator of a public utility type of activity (Title II), and, on the other, it is an agency that licenses radio stations (Title III). Here we need be concerned only with the latter, for the Commission has held that CATV

systems are not common carriers within the meaning of Title II of the Act. See, *Philadelphia Television Broadcasting Co. v. Federal Communications Commission, supra.*

While conceding that common carrier regulation is not involved, Petitioners nevertheless contend that the Commission has the required authority to adopt the CATV rules, and thus to determine whether and to what extent citizens of this country may engage in the perfectly legal business of operating a CATV system. It has such authority, Petitioners say, because Section 2(a) of The Communications Act provides that the provisions of the Act ". . . shall apply to all interstate and foreign communication by wire or radio . . ." and CATV systems engage in "communication by wire". The simple fact of the matter, however, is that there are *no provisions of the Act* that even remotely purport to have anything to do with the control and regulation of wired communication systems that are not common carriers within the meaning of Title II of the Act.

No study or analysis of the legislative history of The Communications Act of 1934, however twisted or tortured, can lead to a conclusion that the Congress, when it adopted the Act, intended anything other than to place the responsibility for administering two separate and distinct statutory laws under one governing body – the Federal Communications Commission. True, those laws – the Interstate Commerce Act, insofar as it pertained to common carrier communications by telegraph, telephone and cable companies, and the Federal Radio Act – were amended in the process, but there were no amendments which contemplated new areas of jurisdiction and responsibility for the Federal Government.

Thus, as the Senate Committee explained in its report on the then proposed Communications Act of 1934, the legislation contains ". . . many provisions . . . copied

verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business . . .". The Report also points out that, while in some paragraphs the language is changed, the ". . . variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of Congressional intent to attempt a different objective." S. Rep. No. 781, 73d Cong. 2d Sess. (1934). (1 Pike & Fischer, R.R. 10:221, 10:222).[7]

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[7] The House also made it clear that no changes in the substance of previous legislation were contemplated by the Communications Act of 1934. Its Report explained the new legislation as follows:

> "The communications industry has been subject to disjointed regulation by several different agencies of the Government. The Interstate Commerce Commission has had jurisdiction over common carriers engaged in communication by wire or wireless since 1910, but has never set up any bureau within its organization designed to concentrate on this field. The Radio Commission has had jurisdiction since 1927 over the licensing of radio stations . . . .
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> * * *
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> "It is important to review the legislative history of the regulation of communications by the Interstate Commerce Commission. That body functions under an Act of 1887 which has been many times amended. It was originally created to regulate railroads and still is primarily concerned with the transportation field, but in 1910 an amendment to the Interstate Commerce Act made common carriers engaged in the transmission of intelligence by wire or wireless subject to its jurisdiction. While a series of minor amendments has followed this 1910 legislation the Act never has been perfected to encompass adequate

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Legislative history thus establishes that the primary purpose of The Communications Act of 1934 was simply to provide for the regulation of common carriers and for the licensing of radio stations by the same agency. Congress did not intend – and the Act does not essay – to create new areas of federally regulated activity.

Moreover, the new act made no changes of substance with respect to the Federal Government's responsibility in the radio field. While the Commission can and does exercise some measure of control over the operations and activities of the radio stations it licenses, such control stems from the licensing function, and the basis for control and regulation is the license. The statutory prohibition as provided in Section 301 of the Act is simply that the use or operation of any apparatus *for the transmission of energy or communications or signals by radio* is unlawful unless such use or operation is first licensed by the Commission. Absent such a license, a user or operator of radio apparatus is subject to fine and imprisonment.

Title III of the Act is entitled "Provisions Relating to Radio" and each and every section of Title III in fact does relate to radio. Furthermore, with a few exceptions, *i.e.*, Section 303(s), all of the provisions of Title III relate only to the

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regulation of communications but has really been an adoption of railroad regulation to the communications field. As a consequence, there are many inconsistencies in the demands of the Act and also many important gaps which hinder effective regulation. In this bill the attempt has been made to preserve the value of Court and Commission interpretation of that Act, but at the same time modifying the provisions so as to provide adequately for the regulation of communications' common carriers." H. Rep. No. 1850, 73d Cong., 2d Sess. (1934). (1 Pike & Fischer, R.R. 10:243-10:244).

radio *transmission* function. Title III of the Act does not purport to be concerned with *the reception* of radio signals and, until the adoption of the rules at issue here, the Commission has never asserted that reception of radio signals or dissemination of information by wire (except by a carrier subject to regulation under Title II of the Act) was any of its business or concern.

The Act has not been changed and a radio station, the apparatus with which the Commission is concerned, is still only a station "equipped to engage in *radio* communication or *radio* transmission of energy." A CATV system is not equipped to engage in *radio* communication or *radio* transmission of energy. It is equipped only to engage in "wire communication" and, therefore, subject to regulation only if it functions as a common carrier within the meaning of Title II of the Act.

In asserting jurisdiction over CATV systems, the Commission relied only on the general rule-making authority granted it by such Sections as 4(i) and 303(f) and (r) which, the Commission contended, ". . . includes authority to take necessary action, not inconsistent with the Act or law, to prevent frustration of Section 307(b) by CATV – an 'interstate communication by wire' to which the Act's provisions are applicable (Sections 2(a) and (3))." See, *Second Report and Order*, Dockets 14895, 15233 and 15971, *supra*, at 729, 6 Pike & Fischer, R.R. 2d at 1727 (A. 5). The Government, at page 29 of its brief, restates this basis of authority as follows:

> ". . . CATV constitutes interstate communication by wire (47 U.S.C. 152(a), 153(e)) since the systems physically intercept and extend television signals. By so doing, they directly affect and threaten

> to disrupt the allocation plan for off-the-air television service established by the Commission under the Act (47 U.S.C. 303(h) and (s), 307(b)). CATV is therefore subject to the Commission's general regulatory powers (47 U.S.C. 154(i), 303(f) and (r), 312(b))."[8]

The point of Petitioners' argument in support of the Commission's jurisdiction, therefore, is that the Commission may adopt rules (and take other actions) regulating wired CATV systems by authority of Sections 4(i) and 303(f) and (r) of The Communications Act for the purpose of implementing Sections 303(h) and (s) and 307(b).[9] The short answer, of course, is that Sections 4(i) and 303(f) and (r) specifically require that the Commission's actions, *i.e.*, regulations adopted, orders issued, etc., *be consistent with the Act or law.* Petitioners thus beg the question.

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[8] The pertinency of Section 312(b) in terms of its relationship to Sections 154(i) and 303(f) and (r) completely escapes Respondents. Section 312(b) merely provides for an administrative sanction, *i.e.*, authorizes the Commission to issue cease and desist orders. It is meaningful with respect to the Commission's authority, or lack of authority, to issue interim restraining orders but it has no bearing, and Petitioners make no effort to show that it does have a bearing, on the basic question of the Commission's authority to regulate CATV.

[9] The pertinency of Section 303(s), insofar as it has a bearing on the point for which it is cited by Petitioners, also escapes Respondents. Section 303(s) simply requires that only so-called "all-channel" (VHF and UHF) television receiving sets be shipped in interstate commerce and the CATV rules obviously have nothing to do with that problem. Moreover, the Commission's authority with respect to Section 303(s) was specifically given it by a separately adopted amendment to the Act. Its proper relationship to the question posed before this Court is explained *infra* at p. 23.

Respondents concede that the Commission has, and must have, authority to adopt rules and take actions ". . . not inconsistent with the Act or law". The key, however, is that its rules and actions *must be consistent with the Act or law* and the particular question for decision is whether the CATV rules are consistent with the authority granted the Commission by law, *i.e.*, by The Communications Act of 1934, as amended. Respondents submit that the court below correctly decided this question in the negative.

As this Court has explained with respect to the extent of the Commission's authority under the so-called general rule-making provisions of the Act, such Sections as 303(r) must be interpreted and applied in connection with the Commission's power to license radio stations.[10] *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 600, 94 L. Ed. 363, 374 (1950).[11] Only when so limited and related are Title III

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[10] Section 303(f) must be similarly applied although Section 4(i) could also be applied in connection with the Commission's power to regulate communications common carriers.

[11] In *Regents of the University System of Georgia v. Carroll*, *supra*, at 597-599, 94 L. Ed. at 373-374, the Court also stated as follows (footnotes omitted):

> ". . . As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress. When to assert its undoubted power to regulate radio channels, Congress set up the Federal Communications Commission, it prescribed licensing as the method of regulation. 47 USCA §307, FCA title 47, § 307. In its action on licenses, the Commission is to be guided by what we have called the 'touchstone' of 'public convenience, interest, or necessity.' Since the licensee receives no rights in the channel beyond the term of its license, the Commission

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rules and Title III actions of the Federal Communications Commission valid and lawful.

The Commission's CATV rules are not based on the Commission's licensing power, and there are no other powers provided by law which support them. In particular, there are no provisions in The Communications Act having to do with the regulation of wired communications systems other than those governing common carriers. Otherwise, insofar as material here, the Commission's authority – and all pertinent provisions of the Act – have to do with the licensing of radio stations. The CATV regulations here involved obviously are not consistent either with the provisions of the Act (or any other law) concerning common carrier regulation or with those concerning the licensing of radio transmission. Accordingly, the court below properly determined the Commission's lack of jurisdiction.

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11 (continued)

> may grant a license to a competittor even though it results in an economic injury to an existing station. Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license. Federal Communications Com. v. Sanders Bros. Radio Station, 309 U.S. 470, 475, 84 L. Ed. 869, 874, 60 S. Ct. 693; National Broadcasting Co. v. United States, 319 U.S. 190, 218, 227, 87 L. Ed. 1344, 1363, 1368, 63 S. Ct. 997. These cases make clear that the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions."

As pointed out above, the Commission (and Petitioners) would have it appear that the CATV rules, and the regulation contemplated thereby, are necessary for the purpose of carrying out the provisions of Section 307(b) of the Act.[12] Section 307(b), however, is specifically limited to the licensing and regulation of radio stations, and, in view of *Regents of the University System of Georgia v. Carroll, supra,* cannot have a bearing on the Commission's jurisdiction over wired CATV systems. Moreover, Section 307(b) has nothing to do with the establishment of any communications policy – federally dictated or otherwise. It does not assure any person, or any community, or any group of persons, access to any television signals or programs. It merely directs the Commission, when it considers ". . . applications for licenses, and modifications and renewals thereof,. . . " and ". . . *when and insofar as there is a demand for . . .* " the facilities applied for, to ". . . make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." (Emphasis supplied).

CATV systems have no need for radio frequencies; they are not making a demand for them; and they do not apply to the Federal Communications Commission for anything. It is submitted, therefore, that Section 307(b) has nothing to do with the operation of a perfectly lawful and locally authorized CATV business, the only purpose of which is to perfect the

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[12] Section 303(h) which authorizes the Commission ". . . to establish areas and zones to be served by any station . . . " is also referred to by Petitioners, but, insofar as the question presented is concerned, that Section is in the same category as Section 307(b) and adds no validity to Petitioners' argument.

ability of the public to receive the "radio communications" that The Communications Act specifically indicates the public is entitled to receive.

Respondents have no quarrel with the Commission's objective of allocating and assigning broadcast frequencies with a view to ". . . making available, *so far as possible,* to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service." (Emphasis supplied) This, in fact, is the responsibility Congress has assigned to the Commission under Section 1 of The Communications Act. On the other hand, Respondents do challenge the legality of the Commission's efforts to foreclose CATV service to those "people of the United States" who at the very least must feel that such service adds to the *efficiency* of their television "service". Some of those people must also believe that CATV brings them somewhat closer to Nation-wide, and even world-wide, communication than they would be if left solely to the offerings of stations which they, as individuals, can receive directly off-the-air.

If Title III of the Act gives the Commission the power and authority to control non-common carrier CATV systems so that those systems do not frustrate Section 307(b) and the allocation policies adopted by the Commission with a view to implementing the objectives of that Section, then the Commission also has the power and authority to adopt rules and regulations requiring television viewers to tune their sets only to their home community stations. Section 307(b) and the Commission's allocation policies are just as likely to be frustrated by tall receiving antennas, individually owned and maintained, as by CATV connections. Obviously, however, The Communications Act in general, and Section 307(b) in particular, do not authorize the Commission to dictate which stations viewers may watch on their sets.

If, in fact, The Communications Act does empower the Commission to adopt rules and take actions governing CATV systems in order that Section 307(b) not be frustrated, then the Act, prior to July 10, 1962 (when Section 303(s) was added) also empowered the Commission to adopt any rules and to take any actions necessary to insure that all television receiving sets shipped in interstate commerce be capable of receiving all frequencies (VHF and UHF) allocated by the Commission to television broadcasting, *and it now empowers the Commission to foreclose the sale of any television receiving set capable of receiving television station signals which, in its unchallengeable discretion, the Federal Communications Commission believes should not be received in any particular community.*

There is no legally significant difference between foreclosing or limiting the use of CATV apparatus and foreclosing or limiting the use of individual receiving sets; yet in 1962, the Commission stated that it needed legislation to accomplish the latter,[13] while it now insists it needs no legislation to accomplish the former. If this Court finds that the Commission has jurisdiction over CATV systems, it will judicially sanction the power and authority of the Commission to dictate the receiving capacity of every television set used in this country.[14]

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[13] See, H.R. Rep. No. 1559, 87th Cong., 2d Sess. (1962), and S. Rep. No. 1526, 87th Cong., 2d Sess. (1962), to accompany H.R. 8031 (1 Pike & Fischer, R.R. 10:481-10:518).

[14] The effect of such a determination by this Court would also grant to the Commission the power and authority to regulate and control the operations, activities and programs of the radio and television networks – the major sources of both news and entertainment for radio and television stations – a power which the Federal

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Furthermore, the two methods of reception, one via CATV wire connections and the other via home receiving antennas and related transmission lines, cannot be legally distinguished on the basis of Sections 2(a) and 3(a) of the Act. Section 2(a) merely provides that the *provisions* of the Act shall apply to all interstate and foreign communications by wire or radio, *i.e.*, the provisions of Title II shall apply to common carriers (whether engaged in wire or radio communications), and the provisions of Title III shall apply to the licensing of *radio* stations.

Section 3(a) on the other hand (as well as Section 3(b)), is merely concerned with defining "communication" to insure that all phases of common carrier activity – not merely the transmission function – are subject to regulation under the provisions of Title II. In this connection, it will be noted that the definitions of "wire communication" and "radio communication" in Sections 3(a) and (b) include ". . . all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications)

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14 (continued)

Communications Commission has repeatedly advised the Congress it does not have under present legislation. See, *Television Network Program Procurement*, Report of the Committee on Interstate and Foreign Commerce, H.R. Rep. No. 281, 88th Cong., 1st Sess. (1963). If CATV systems are (as Petitioners say they are) subject to Commission jurisdiction and regulation because they ". . . physically intercept and extend television signals . . . " then the networks are also subject to the Commission's jurisdiction because they "physically" initiate and contract for the distribution of the signals that are later intercepted and extended. Petitioners' theory of Commission jurisdiction over CATV systems would also subject the private wired communications systems of the press services, railroads and other industrial users to Commission regulation and control as explained in more detail in the brief of Respondent Southwestern Cable Co.

incidental to . . . transmission." The basic purpose of including in both Sections 3(a) and (b) such "services" as the "receipt, forwarding, and delivery" of communications as well as "instrumentalities, facilities, apparatus", incidental to transmission was to assure that all phases of point-to-point wire and radio communications would be subject to the provisions of Title II of the Act. By their very terms, these sections have no meaning insofar as the licensing and related provisions of Title III of the Act are concerned. If Congress had intended to include the receipt, forwarding and delivery of radio signals *per se* within the meaning of the Commission's non-common carrier licensing responsibilities, it would have done so specifically.

It follows, therefore, that Sections 2(a) and 3(a) of the Act cannot be used as a bridge whereby the provisions of Sections 303(f), (r) and (s), 307(b), or any other section of Title III, are made applicable to the dissemination of information (writing, signs, signals, pictures, sounds, etc.) by wire, cable or other like connections or to the reception of such information so transmitted. These provisions deal specifically with "radio stations" and the transmission of radio energy, and they are applicable only to radio stations. Since CATV systems are not radio stations, they cannot be controlled or regulated in any way under Title III of the Act, and the Commission's efforts to so control and regulate them are, therefore, unlawful.

If Petitioners' theory of the jurisdiction of the Federal Communications Commission is correct, the end result is that The Communications Act of 1934, as amended, authorizes the Commission to regulate and control all sources of information and entertainment. As the Commission itself stated in 1959, when it then declined to assume jurisdiction over CATV systems:

"In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any nonbroadcast competitive enterprise. Thus, for example, we might logically be requested to invoke a prohibition against access to common carrier facilities by such enterprises as closed-circuit music and news services, closed-circuit theater television operators, and, possibly, even ordinary motion picture and legitimate stage operators, magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. The logical absurdity of such a position requires no elaboration." *In re, Inquiry Into the Impact of Community Antenna Systems, etc. On the Orderly Development of Television Broadcasting,* 26 F.C.C. 403, 431-432 (1959).[15]

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[15] The Commission's admitted lack of jurisdiction over CATV systems was judicially noticed by the United States District Court for the District of Idaho (Southern Division) in *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47 (1962), *reversed on other grounds,* 335 F. 2d 348 (C.C.A. 9th, 1964), wherein, at page 55, the Court stated as follows:

"As indicated in this Court's previous discussion of the history of this so-called consent provision, community antenna services are not 'broadcasters' within the meaning of the definition of 'broadcasting' as presently stated in the Federal Communications Act. (FCA, 47 U.S.C. 153(a)). The Congress has consistently refused to adopt amendments necessary to make that provision applicable to community antenna services . . .

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It is indeed absurd to even suggest that the Congress would place such power and authority in the hands of an administrative agency, which by its very nature is divorced and isolated, in terms of its responsibilities, from the electorate.

That Congress did not intend to and did not grant the Federal Communications Commission such "sweeping" and "comprehensive" power is evident from the reaction generated by a recent request of the Commission for a "retroactive" amendment to The Communications Act which would give it statutory authority over CATV systems. (See, H.R. Rep. No. 1635, 89th Cong., 2d Sess., submitted June 17, 1966, to accompany H.R. 13286). The minority views on the Bill (*Id.* at 23-25) were expressed as follows:

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15 (continued)

> "So it is that under present national policy, community antenna services remain a permissible and as yet unregulated means of television reception. Accordingly, the Federal Communications Commission has held that it does not now have jurisdiction over community antenna services."

Earlier, on September 8, 1959, Senator Pastore, from the Committee on Interstate and Foreign Commerce, reported to the United States Senate Bill S. 2653 entitled, "A Bill to amend the Communications Act of 1934 *to establish jurisdiction in the Federal Communications Commission* over community antenna systems." (Emphasis supplied) Calendar No. 950, S. 2653 (Rep. No. 923), 86th Cong., 1st Sess. In 1960, following debate on the floor of the Senate, this Bill was recommitted to the Committee. 106 Cong. Rec. 10326, 10344, 10407, 10520, and 10546.

If, as is specifically stated, the purpose of S. 2653 was to establish the Commission's jurisdiction over CATV, then its failure of passage of necessity left the Commission where it was (and where it is today), i.e., without jurisdiction.

"H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; . . . it would create an entirely new concept of regulation at Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a person could or could not receive over his television or radio set — to name a few of the flaws.

"Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the limited frequencies available in the spectrum. Regulation was for the sole purpose of properly

policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

"The history of the Communications Act of 1927 and the amendments thereto of 1934 reflects clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this attempt by the passage of a bill denying them the power to enter the field of economic control.

"H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain

economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

"A CATV system is a wired communications system and does not use the spectrum of public domain for broadcasting purposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisdiction of CATV systems as such.

* * * * *

"If the Congress passes H.R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals — jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite transmittals, as well as local broadcasting stations and network broadcasts. Freedom requires that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

* * *

"It is to be noted that the Federal Communications Commission, although previously denying

> jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it wants badly – an entirely new concept in governmental regulation."

Respondents recognize that the United States Court of Appeals for the District of Columbia Circuit has recently held that the Commission does have jurisdiction to regulate CATV systems which do not employ microwave transmission, basing its decision on the broad ground that the enlargement by CATV systems of the signal range of licensee stations reacts ". . . to the potential detriment of the entire regulatory scheme." See, *Buckeye Cablevision, Inc. v. Federal Communications Commission,* No. 20274, United States Court of Appeals for the District of Columbia Circuit (June 30, 1967).

For the reasons set forth above in this brief, Respondents submit that the *Buckeye* decision is wrong. Rather than decide the points raised by the appellant in that proceeding, it does nothing more than add a judicial gloss to the Commission's own opinion. Like the Commission's opinion, it patently fails to come to grips with the issues or with the important fundamental legal and jurisdictional questions involved.

The Commission and the District of Columbia Circuit Court have bootstrapped themselves

> ". . . into an assertion of jurisdiction over all CATVs without ever squarely defining, analyzing and considering the issues, the legal basis of . . . jurisdiction and the limitations of the jurisdiction asserted. By this intellectual bootstrapping operation . . . [they have] moved from a specific statutory authority to license interstate radio transmissions to the assertion of . . . power to regulate and prohibit the intrastate transmission by wire of programs originating, broadcast and received within the same state. As authority . . . [they rely] on a Supreme Court opinion upholding regulation of interstate radio transmission by licensing because of its 'unique characteristic' and blandly assert . . . that . . . the same principles should . . . apply to communication that is not by radio and that has entirely different characteristics . . . ." *Dissenting Opinion of Commissioner Lee Loevinger On Reconsideration of CATV Rules,* Docket Nos. 14895, 15233 and 15971, 8 Pike & Fischer R.R. 2d 1698, 1701 (1967) (A. 135).

The important jurisdictional questions now posed before this Court are deserving of much more than the treatment accorded them by the District of Columbia Court in *Buckeye.* Particularly disturbing is that court's disposition of this Court's *Carroll* precedent on the theory that the holding was based largely on the Commission's then lack of authority to issue cease and desist orders. Respondents respectfully submit that this Court's decision in *Carroll* was not at all based on or dependent upon the Commission's authority (or lack of authority) to issue cease and desist orders. It could not be so predicated in view of the fact that this Court understood, and so stated, that the Commission's then pending request for

statutory authority ". . . did not go beyond asking for power to issue a cease and desist order *against a licensee.*" *Regents of the University System of Georgia v. Carroll, supra*, at 602, 94 L. Ed. at 375. (Emphasis supplied)

Section 312(b) of The Communications Act, as later amended, did give the Commission cease and desist authority but (insofar as pertinent here) only with respect to violations of, or failures to observe, license terms or conditions and rules or regulations *otherwise authorized by the Act.* The legislation in no way changed the extent of authority granted the Commission by Section 303(r) or similar provisions of the Act on which the Commission relies in support of its asserted CATV jurisdiction. As the Committee of Conference on the Section 312(b) amendment pointedly explained, ". . . the authority to issue cease and desist orders . . . (gives) the Commission a means by which it can secure compliance with the law and regulations *by licensees . . .*" *Conference Report on Communications Act Amendments,* 1952, H.R. Rep. No. 2426, 82d Cong., 2d Sess., submitted July 1, 1952, to accompany S. 658, 1 Pike & Fischer R.R. 10:341, 10:437. (Emphasis supplied).[16]

The question here is not, as the *Buckeye* decision would have it appear, whether a regulatory scheme, established (rightly or wrongly) in connection with the licensing of radio transmitters, would suffer if not extended to encompass the dissemination of information by wire. The question is

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[16] Admittedly, the Commission may use cease and desist orders in some non-licensing areas but only when it has been *specifically* authorized to act therein, *i.e.*, to enforce Section 303(s) of the Act requiring that all television sets shipped in interstate commerce be capable of receiving all television channels, VHF and UHF.

whether the Federal Communications Commission possesses the required statutory authority to make the extension and this Court, dealing specifically with that question in *Carroll*, has decided that the Commission does not possess such authority.

In *Buckeye*, the lower court found that the Commission's authority to regulate CATV systems basically flowed from Section 1 of The Communications Act (a theory *not* urged by Petitioners before this Court) which the court stated ". . . *directs* the Commission to provide 'a rapid, efficient, Nation-wide and world-wide wire and communications service . . . " (Emphasis supplied) The simple fact of the matter is that Section 1 of The Communications Act directs nothing of the kind. Section 1 merely sets forth the purpose for which the Federal Communications Commission was established, *i.e.*, to regulate ". . . interstate and foreign commerce in communication by wire and radio so as to make available, *so far as possible*, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service . . . ." (Emphasis supplied) Respondents respectfully submit that the United States Court of Appeals for the District of Columbia Circuit has, in effect, erroneously rewritten The Communications Act. It has done this in order to support a decision upholding a claim of jurisdiction which it (the court) believed the Commission should have, instead of the jurisdiction which Congress, the responsible branch of the government, saw fit to give it. The court below (the Ninth Circuit) properly interpreted the will of Congress and its decision should be affirmed.

B. The Control of Competition Is Beyond the Power of the Commission

The purpose of the CATV Rules is clear and unmistakable — it is to prevent economic competition to television stations. The Commission's Second Report and Order frankly admits that the purpose of the Rules is to prevent the possible demise of UHF television stations because of economic competition.[17] It is submitted, therefore, that the Commission's assertion of jurisdiction cannot be upheld, unless it can be found that Congress specifically conferred this power upon the Commission – *i.e.*, the power to protect broadcast stations from competition, both from other stations and from other businesses.

There can be no real question but that the paramount public policy of the United States, as to the relationship of government to business, is firmly grounded upon the principle of free and competitive business enterprise and that exceptions to that policy at the federal level can be made only by Congress. Tampering with free competitive business by government, to the extent of eliminating competition, places that business, at least, in a public utility category, if not in a category subject to even more governmental supervision, direction

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[17] *Second Report and Order, supra* at 737, 774, 6 Pike & Fischer, R.R. 2d at 1735, 1777 (A. 13, 50). Later, however, in a separate proceeding involving Respondents, the Commission emphasized that the principal question was whether the unlimited expansion of service by CATV systems ". . . will have such an impact upon local television service, VHF as well as UHF, as to adversely affect the public interest and, if so, the remedial steps which must be taken in the public interest to prevent the demise or impairment of local television service . . . ." In re *Midwest Television, Inc. (KFMB-TV*, 5 F.C.C. 2d 686, 688, 8 Pike & Fischer, R.R. 2d 1075, 1078 (1966).

and control than attaches to public utilities. In *Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231, 248, 249, 95 L. Ed. 239, 250, 251 (1951), this Court succinctly stated this principle.

> "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' "

Moreover, this Court has held that one who seeks to exclude a broadcast station from a market thereby attempts to monopolize commerce contrary to this national economic policy. *Lorain Journal Co. v. United States,* 342 U.S. 143, 96 L. Ed. 162 (1951).

It is not disputed, however, that this national policy favoring competition can be, and has been modified by Congressional action in authorizing the elimination, or at least the control, of competition in regulated industries. Since the antitrust laws, which promulgate the national policy in favor of competition, were on the books before most regulatory agencies were created, it is clear that the later statutes were enacted with Congressional knowledge of the existing and controlling economic national policy. In *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 218, 15 L. Ed. 2d 709, 713 (1966), this Court adopted a simple and clear principle for resolving any conflict that might arise:

> "We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot

> lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry."

Following this principle, for example, the Court has determined that the Federal Aviation Act of 1958, 72 STAT. 737, as amended, 49 U.S.C. §§1301 *et seq.*, has given the Civil Aeronautics Board the power to control competition through the authorization of mergers. *Pan American World Airways v. United States*, 371 U.S. 296, 9 L. Ed. 2d 325 (1963). The Second Circuit followed this ruling in *Trans World Airlines v. Hughes*, 332 F. 2d 602, 606 (1964), *cert. granted*, 379 U.S. 912 (1964), *cert. dismissed*, 380 U.S. 248 (1965), when it stated as follows:

> "The proposition has so often been stated that it has become hornbook law that immunity from the operation of the antitrust laws is not lightly to be inferred from the enactment of a regulatory statute. Yet Congress may effect such a design *through explicit enactment of an immunizing provision*, and Congress has done so on occasion." (Emphasis supplied, citation and footnote omitted)

On the other hand, it has been held that the Security Exchange Act of 1934, 48 STAT. 881, as amended, 15 U.S.C. §§ 78a *et seq.*, and the Merchant Marine Act of 1936, 49 STAT. 1985, as amended, 46 U.S.C. §§1101 *et seq.* do not provide exemptions from the anti-monopoly policy adopted by Congress. *Silver v. New York Stock Exchange*, 373 U.S. 341, 10 L. Ed. 389 (1963); *Pacific Far East Line v. Federal*

Maritime Board, 107 U.S. App. D.C. 155, 275 F. 2d 184 (1960), *cert. denied,* 363 U.S. 827, 4 L. Ed. 2d 1523 (1960).

With these basic principles in mind, an examination of The Communications Act of 1934, as amended, is appropriate. It is unnecessary to demonstrate by reference to legislative history, and the circumstances which led to their original enactment, that the principal objectives of the Radio Act of 1927, and of Title III of The Communications Act of 1934, were the regulation of the technical aspects of radio frequency allocation, to provide relief from the interference chaos that had developed prior to 1926, to establish a system for the fair, equitable and efficient distribution of such frequencies in the future, and to regulate ownership and control of stations so as to preserve competition and prevent monopoly in radio communications.

> "The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.

"In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

* * *

". . . the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment and financial ability to make good use of the assigned channel.

* * *

". . . Congress intended to leave competition in the business of broadcasting where it found it,

> to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public." (Footnotes omitted) *Federal Communications Commission v. Sanders Bros. Radio Station, supra* at 474-475, 84 L. Ed. at 873-874.[18]

If, as this Court has said, Congress intended "to leave competition in the business of broadcasting where it found it" and to permit a broadcaster "to survive or succumb according to his ability to make his programs attractive to the public," it obviously intended that the broadcaster was not to be protected against competition.

All free competitive businesses, of course, are subject to some limitations and restrictions, both as to location and product or service, but the restrictions and limitations are such that they do not change the free competitive nature of the business. Otherwise, the business ceases to be freely competitive and becomes a public utility subject to regulation.

Obviously, as this Court made clear in the *Sanders* decision, Congress did not intend to subject the business of broadcasting to public utility regulation, or to anything similar thereto. In a few instances, Title III of The Communications Act (and its predecessor the Radio Act of 1927, from which the Commission derives its authority) singles out broadcasting

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[18] The holding of this Court in *Sanders* relates solely to two points: First, that economic injury provides standing to appeal under The Communications Act; and second, that economic injury to an existing station is not a factor to be considered by the Commission in granting licenses. The quoted portion of the opinion is clearly directly related to and a pertinent part of this latter point.

for special legislative and regulatory treatment, but otherwise, the Commission's statutory power, authority, and responsibility in connection with the licensing of radio stations for broadcast use is no different than its power, authority, and responsibility in connection with the licensing of the many other classes and types of radio stations subject to the Commission's jurisdiction.

That Congress did not intend such a result is best illustrated (except perhaps by the language of the Act, itself) by the proceedings in the United States Senate in connection with S. 1333. S. 1333, among other things, proposed to amend Section 307(b)[19] of The Communications Act of 1934 to read as follows:

> "In considering applications for licenses, and modifications thereof, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same, *giving effect in each such instance to the needs and requirements thereof.*" (Emphasis supplied) *Hearings before Subcommittee of the*

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[19] Section 307(b), then, as now, reads as follows:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Committee on Interstate and Foreign Commerce on S. 1333, 80th Cong., 1st Sess. (1947), p. 4.

The obvious purpose of the foregoing amendment was to eliminate the clause "when and insofar as there is demand for the same" from Section 307(b) and to substitute a general requirement that the Commission give effect to the "needs and requirements" of communities where there was no competitive application from another community for the frequency involved. Testifying in opposition to this amendment, the then chairman of the Federal Communications Commission, after explaining that the amendment ". . . would delete the requirement as to demand and instead require the Commission to give effect to the needs and requirements of the various communities . . .", pointed out that if the amendment merely required ". . . the Commission to consider the needs and requirements of communities when the issue before the Commission is a question of which of two competing applications from different communities should be granted . . .", it would not be objectionable, since Section 307(b) "as it now stands" requires the same consideration. The change would be objectionable, he testified, if the amendment would require the Commission to consider the "needs and requirements" in the absence of a ". . . competitive application from another community for that frequency." (*Id.* at 33) He then stated:

> "Under the normal operation of the competitive system either you have free competition, or you do not. Either you have free competition, or you have some restriction on free competition.
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> "Now, if this section is adopted as written, it is certainly going to be urged that it imposes very

definite restrictions on free competition; so much so that I am afraid it is going to be successfully argued that if it were enacted, it would throw the competitive system out the window.

"We do not want to do that, and therefore I think that if we are to have some limit on free competition, we have got to have some compass to guide us and tell us exactly what the limits are. I think we have got to work out the formula here in these sessions." (*Id.* at 40)

The proposed amendment was not adopted and thereafter the United States Court of Appeals for the District of Columbia Circuit acknowledged that the principle of free competition continued to govern the Federal Government's relationship to the broadcast industry:

"Competition, of course, is between broadcasters on different frequencies covering the same area. *If there be only one applicant for a given frequency in a given area, the community need for a new station and the relative ability, above the minimum requirements of the applicant to render service are immaterial.* But, if a choice must be made between two qualified applicants, the problem has a different aspect. And, if a choice must be made between two communities, still further considerations are involved. In the latter case, the public interest and an equitable distribution of service may well require a determination of the relative needs of the communities for more service . . . . " (Emphasis supplied) *Easton*

Publishing Co. v. Federal Communications Commission, 85 U.S. App. D.C. 33, 35, 175 F. 2d 344, 346 (1949).

Both the courts and the Commission, itself, have concluded that Title III of The Communications Act confers no immunity from the operation of the antitrust laws and must be administered in harmony with the policy established thereby. As early as 1943, three years after *Sanders,* this Court quoted with approval the Commission's statement that it was required to " '. . . administer its regulatory powers with respect to broadcasting in light of the purposes which the Sherman Act was designed to achieve . . . .' " *National Broadcasting Company v. United States,* 319 U.S. 190, 223, 87 L. Ed. 1344, 1366 (1943).

In 1953, this Court had occasion to consider the effect of the national policy favoring competition upon the powers of the Commission insofar as Title II was concerned. In *Federal Communications Commission v. RCA Communications,* 346 U.S. 86, 97 L. Ed. 1470 (1953), it held that the Commission erred in relying solely upon the national policy of competition to support an award of duplicate facilities to a common carrier. The Court specifically pointed out there were limitations upon this national policy and made it clear that the common carrier field was one in which such an exception has been made because there may be valid reasons to limit competition. *Id.* at 91-92, 97 L. Ed. at 1476, 1477.

Finally, in 1959, this Court specifically overruled the contention that Title III of The Communications Act of 1934, as amended, gave the Commission authority to pass upon antitrust questions in the broadcast industry. In this case, *United States v. Radio Corp. of America,* 358 U.S. 334, 348-350, 3 L. Ed. 2d 354, 364-365 (1959), the Court held:

> "While the television industry is also a regulated industry, it is regulated in a very different way. That difference is controlling. Radio broadcasters, including television broadcasters, see *Allen B. Dumont Laboratories, Inc. v. Carroll* (CA 3 Pa), 184 F. 2d 153, are not included in the definition of common carriers in §3(h) of the Communications Act, 47 USC §153(h), as are telephone and telegraph companies. Thus the extensive controls, including rate regulation, of Title II of the Communications Act, 47 USC §§ 201-222, do not apply. Television broadcasters remain free to set their own advertising rates. [Citing *Federal Communications Com. v. Sanders Bros. Radio Station, supra.*]
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> "Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." (Footnotes and quotation omitted)

The Court went on to state that the Commission may, when determining the "public interest, convenience and necessity" consider the federal antitrust policy. Thus, in a particular case, "antitrust considerations alone" might keep the statutory standard from being met and serve as grounds for a dismissal. *Id.* at 351, 3 L. Ed. 2d 366. But the Court did not say that the policy favoring competition and antitrust considerations could be ignored or overruled.

The Commission formerly held that it had no power to consider the effect of competition and that broadcasting is a free, competitive business. Three months after the *Sanders* decision, the Commission had occasion to reaffirm this conviction in *Presque Isle Broadcasting Co.*, 8 F.C.C. 3, 9, 10 (1940):

> "It is inescapable that the intent of Congress would be completely nullified, and the Supreme Court's declaration concerning the desirable effects of competition would be rendered entirely meaningless if the Commission were required to deny a new station to enter the field merely because it would adversely affect the ability of an existing station to continue to serve the public. It is a direct contradiction of the proposition that free competition is the basic principle of the American system of broadcasting to contend that the Commission is under a duty to consider the effect which competition may have upon the ability of an existing licensee to continue to serve the public. It is implicit in the idea of free competition that public interest cannot possibly be adversely affected by the failure of an existing station to survive due to increased competition, because this result cannot follow unless the new station's competitive efforts enable it to render a superior public service. In other words, under the statute, competition which an applicant has to face may be important because his financial qualifications may depend upon it; but the effect of competition with which an existing licensee is confronted as a result of a new station need not be considered by the Commission under the statute because whatever that effect may

be, it is only the end product which a system of free enterprise is designed to produce."

Again, in 1957, the Commission specifically held that it had no power to consider the adverse effects of legal competition upon service to the public. *Southeastern Enterprises (WCLE)*, 22 F.C.C. 605, 614-615, 13 Pike & Fischer, R.R. 139, 149-150 (1957). In that case, the Commission carefully pointed out the difference between its regulatory powers under Title II and Title III in the following manner:[20]

"40. If the protestant's allegations are true and the public is injured in this case, it must persuade Congress to modify the law and provide for protection against competition in such cases as the protestant's. Until Congress gives us the power to permit something less than free competition in the industry, we have no power to save either the public or the protestant from certain of competition's uncomfortable effects.

"41. This must be our disposition with respect to protestant's request for relief from competition because we cannot assume that Congress intended for us to prevent free competition in certain instances and yet not impose regulatory substitutes in such instances. Congress has not given us the power, as in the case of the carriers that we

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[20] But see, *The Voice of Cullman*, 14 F.C.C. 770, 6 Pike & Fischer, R.R. 164 (1950); *Kaiser Hawaiian Village Radio, Inc.*, 22 F.C.C. 751, 13 Pike & Fischer, R.R. 849 (1957); *Iredell Broadcasting Co. (WDBM)*, 23 F.C.C. 79, 13 Pike & Fischer, R.R. 996 (1957).

> regulate under Title II, to regulate the business of a broadcast licensee. Section 3(h) of the Communications Act of 1934, as amended; Sanders case, 309 U.S. 470 (1940). The extent to which we would get into regulation of the business aspects of a broadcast licensee is clear from a consideration of what we must do to properly determine Issues 1 to 4."

This statement represented the position of the Commission until 1958, when the United States Court of Appeals for the District of Columbia Circuit held that the Commission *must* consider the effect of economic competition upon the public interest in awarding a license to a new broadcast station when it would be in competition with an existing station in the same community. The doctrine was promulgated over the objections of the Commission in *Carroll Broadcasting Co. v. Federal Communications Commission,* 103 U.S. App. D.C. 346, 349, 258 F. 2d 440, 443 (1958). In that case, the Circuit Court held that under the following *dictum* in *Sanders, supra* at 475-476, 84 L. Ed. at 874-875, the Commission had the power and responsibility to determine whether the effect of an award of a second license in the area would be to damage or destroy service to an extent inconsistent with the public interest:

> "This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both

> stations – the existing and the proposed – will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service."

Today, this doctrine is being urged as justification for a gigantic leap toward government control – that the public interest requires the protection of broadcasting from economic competition from a non-licensed business – a position which the Commission once characterized as absurd.[21] Thus, Title III has come full circle – the public interest, which first was held to be the same as that expressed in the antitrust laws, has now come to be the exact opposite of the public interest protected by these same laws – and all without a single statutory change by Congress.

In reaching this determination, the original purpose of Title III has been forgotten as has this Court's warning that the criterion "public convenience, interest and necessity" ". . . is not to be interpreted as setting up a standard so indefinite as to confer unlimited power." *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., supra* at 285, 77 L. Ed. at 1178. The clear meaning of the Act, in providing the Commission with specific powers in Title II and in withholding similar powers in Title III, is that Congress intended to ". . . render the more general provisions of the antitrust laws . . . " inapplicable to common carriers but to retain their applicability to broadcasting.

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[21] *CATV and TV Repeater Services*, 26 F.C.C. 403, 431-432, 18 Pike & Fischer, R.R. 1573, 1603 (1959).

It appears inconceivable that, once it has been determined that the criminal and civil provisions of the antitrust laws and the economic policy of competition are applicable to broadcast licensees, it can be held that the Commission has the power to limit or control competition. Under cover of the CATV rules, a dominant network television station in San Diego has been leading a fight to limit or eliminate CATV competition in that community. This is a situation analogous to that condemned by the Commission and the Court in the *Lorain Journal* case. In the *National Broadcasting Company* case, the Court held that Commission approval of a merger did not protect the licensees involved from the antitrust consequences of their acts.

The anamolous position of the Government is emphasized by the positions the Department of Justice has taken in various cases involving CATV. In the United States Court of Appeals for the District of Columbia Circuit, the Department opposed the merger of International Telephone and Telegraph Corporation and American Broadcasting Companies, Inc. In its brief, it accepted the principle that under The Communications Act ". . . the field of broadcasting is one of free competition. . ." citing *Sanders, supra*;[22] and that the merger would prevent ITT from developing CATV systems ". . . which would offer services competitive with the existing conventional broadcasting structure. . . ."[23] In this regard, the brief states:

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[22] Brief for Department of Justice, Case No. 21147, United States Court of Appeals for the District of Columbia Circuit, p. 17.

[23] *Id.* at p. 49.

> "CATV and the closely-related concept of a pay-TV cable system are among the most important potential developments which would multiply the channels of broadcast transmission, and provide competitive alternatives to the existing structure of broadcasting. If local CATV systems bring in non-network programs from distant areas or originate their own programming, they will offer significant competition to the local, network-affiliated broadcasting stations. Moreover, development of economic methods of interconnecting local CATV systems into regional or national CATV grids would have an especially significant competitive impact. It would facilitate the entry of new companies into the large-scale production and distribution of programming in a manner similar to and competitive with conventional network television."[24]

However, the Department must try to harmonize this argument for CATV competition with the fact that such a principle runs directly counter to the Commission's present policy under the new CATV rules. To do so, it argues that antitrust policy is satisfied by the existence of persons who disagree with a Government policy against competition.[25] It is apparent that the Department is hiding its head in the sand. Any realistic appraisal would confirm that the Commission's rules are designed solely to prohibit CATV competition in the top 100 markets. The fact that theoretical waivers are possible, which provisions were incorporated primarily for legal purposes,

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[24] *Id.* at p. 61.

[25] *Id.* at p. 68.

cannot obscure this fact. Moreover, the time-consuming device of exhausting the administrative remedy will eliminate the possibility of competition for years to come. Thus, Commission regulation can only destroy the very result which Justice contends is required by national policy and the public interest.[26]

The Department's recent position that copyright law provisions apply to CATV operations[27] is much more realistic although still inconsistent with the Government's position in this case. The fact is that once a CATV system is required to pay a fair cost of operation, *i.e.*, it is equally responsible for a reasonable license fee for presenting copyrighted material, the Commission's charge of "unfair competition" will cease to exist, and with it the need of Commission regulation. Moreover, no responsible CATV owner really contends that CATV is "free" as is off-the-air broadcasting, so the imposition of copyright fees will not change the status of CATV. The viewer is required to pay a reasonable subscription fee to receive CATV service. But this fee must include *all* the costs of doing business and cannot be artificially low because of a Government subsidy. When both broadcasting and CATV systems are able to furnish their products without either having an "unfair" economic advantage, the public profits. Thus, if "free" television service can offer programming that attracts viewers, it has nothing to fear from the CATV operator who pays a "fair"

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[26] It is reported that Justice is looking into the anti-competitive effects of combinations of TV stations and CATV. *Broadcasting*, Vol. 74, p. 5 (January 29, 1968).

[27] Memorandum for the United States as *Amicus Curiae*, *Fortnightly Corporation v. United Artists Television, Inc.*, Case No. 618.

price for his product. The failure of "free" television to present attractive programming, *i.e.*, provide a better mousetrap, is no justification for suppression of competition. Only if "free" television has to compete at an economic disadvantage, would it be justified in running to the Government for economic protection. Thus, the adoption of the Department of Justice's position in the *Fortnightly* case would eliminate any contention of a need for economic protection from CATV. Moreover, it would allow Congress an opportunity to give the Commission, by appropriate statutory amendment, the express authority required, if competition in broadcasting is to be eliminated.

The present CATV rules illustrate the danger arising from the inevitable extension of the lower court's ruling in *Carroll Broadcasting Co.* Today, the public's only control over broadcast content is its ability to turn to another station. Consequently, the American citizen has exercised his inherent right and ingenuity to secure as many television services as possible as sources of entertainment and information. If that right and ingenuity are limited, eliminated or circumscribed by a federal agency in Washington in order to give local television stations freedom from competition, the public, alone, will suffer. The Commission admittedly has no control over program content, the number and amount of commercials and the rates a broadcaster may charge. Congress specifically withheld this power and gave the public the right of competition as protection – *i.e.*, the right to turn to another channel. To maintain and enforce this right, the public is willing to pay for an added service which can only be furnished by CATV systems. This right of choice – the right to benefit from competition – is something only Congress can take from the American public. Moreover, if Congress takes away this right, it will have to substitute controls in Title III just as it did in Title II. Until

Congress affirmatively and explicitly makes known its intent in this vital policy field, neither the Commission nor the courts can infer that broadcasting was intended to be half-free and half-controlled so that the public is to receive the worst of each system.

It is submitted that the *dictum* in *Sanders*, as interpreted by the United States Court of Appeals for the District of Columbia Circuit, is clearly inconsistent with the holding in that case and this Court must decide either (1) to overrule *Carroll Broadcasting Co.* and determine that broadcasting is a freely competitive industry and the control of competition is beyond the authority of the Commission unless expressly conferred by Congress; or (2) overrule the holding in *Sanders* and determine that the effect of competition on the public must be considered by the Commission in broadcast matters, and consequently that broadcasting is not a freely competitive business. However, even an affirmance of the *Carroll Broadcasting Co.* decision should provide that the Commission's power to consider competition is limited to its function of licensing other broadcasting stations. Otherwise, the Commission could just as logically assume that the public interest requires that every community be guaranteed that a certain number of UHF stations will be able to exist and that the Commission is obligated to suppress or control any economic competition that might threaten the economic well-being of these stations, if it involves interstate communication by wire. It might just as logically and legally limit the amount and kind of news in newspapers which is received from the press services (these services use wire and radio facilities and are in competition with radio and television).[28] Moreover, only a short

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[28] The issue of freedom of speech was raised before the lower court, but not decided in the decision on review. It is clear, however,

(continued)

extension of the principle would allow the Commission to control the amount and kinds of full-length features that are shown in local theatres (these films are shipped in interstate commerce and compete with films on television), and the height and design of receiving antennas that may be erected by local citizens (for example, in San Diego, California, the receipt of off-the-air Los Angeles signals obviously fragments the local station's audience).

For these reasons, it is submitted that the elimination of CATV compeititon to broadcast stations is not one of the purposes of The Communications Act of 1934, as amended. It follows, therefore, that the Commission's adoption of the CATV rules, which are designed for this purpose and this purpose alone, is clearly beyond the power of that agency.

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28 (continued)
that a grave constitutional question is raised by the Commission's ruling that it can limit the right of an American citizen to view the signal of the station of his choice which is or can be made available on CATV. It is apparent, therefore, that the danger sought to be avoided by the Commission, albeit not a "clear and present danger", is the danger that local television stations will be faced with economic competition. While this danger might, and probably does, justify the imposition of reasonable copyright fees and perhaps Congressional action to afford other property right protection for television broadcast stations, it certainly does not justify restriction of the freedom of speech guaranteed by the First Amendment. *Weaver v. Jordan*, 64 Cal. App. 2d 235, 411 P. 2d 289 (Calif. 1966), *cert. denied*, 385 U.S. 844, 17 L. Ed. 2d 75 (1966). See, Comment, *Refusal of Radio and Television Licenses on Economic Grounds* (1960), 46 Va. L. Rev. 1391; Wall, *Program Evaluation by the Federal Communications Commission, An Unconstitutional Abridgment of Free Speech* (1951), 40 Georgetown L.J. 1.

II.

THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ISSUE A RESTRAINING ORDER IN ORDER TO MAINTAIN THE *STATUS QUO* PENDING THE OUTCOME OF A HEARING

Petitioners' theory of the Commission's authority to issue the temporary restraining order involved here assumes the basic authority to regulate CATV in the first instance. Thus, Petitioner, Midwest, argues that the ". . . Commission's grant of an interim stay is properly grounded in its express power to issue orders and prescribe restrictions requisite to accomplish its statutory responsibilities." As explained above, in Point I of this brief, the Federal Communications Commission has no responsibilities – statutory or otherwise, and no power or authority, with respect to CATV. It follows, of course, that Congress did not give the Commission the useless power to enforce – by temporary restraining orders or otherwise, rules and policies which it was not empowered to adopt. This is the short answer to Petitioners' contention that the Federal Communications Commission is empowered by The Communications Act to issue a temporary restraining order such as involved here. Respondents submit that the converse argument is much more logical, *i.e.*, since the Congress provided no enforcement procedures for CATV regulatory actions, it obviously did not intend that the Commission have the authority to regulate CATV.

But even if the Commission does have general jurisdiction to regulate non-microwave CATV systems (an *assumption* which must be made if the second question presented by this case is to be reached), it clearly does not have the added authority to stay legal activities pending a hearing to determine whether those activities should be permanently enjoined.

Petitioners' position to the contrary is based on the same Sections 4(i) and 303(r) of The Communications Act on which they rely in support of their jurisdictional theory. But if those sections provide such authority, the perfectly logical question arises as to why it was necessary to obtain specific statutory authority before the Commission could issue cease and desist orders which are now provided for in Section 312(b) of the Act. The court below was quite correct when it concluded as follows:

> ". . . If the authority of sections 4(i) and 303(r) were as broad and extensive as the Commission urges, the authority of section 312 to issue cease and desist orders would be meaningless or repetitive. There is nothing to indicate that if the Commission is empowered to issue an order like that under review it cannot similarly issue a cease and desist order without the safeguards of section 312. *Cf. United States v. National Plastikwear Fashions, Inc.*, 123 F. Supp. 791 (S.D. N.Y. 1954). We must assume that when Congress in 1952 gave the Commission the power to issue cease and desist orders it was not duplicating an already existing power."

The pointed answer to Petitioners' contention is that the specific delegation of authority contained in Section 312(b) of the Act negates the existence of any general injunctive power under Sections 4(i) and 303(r). The only provision in The Communications Act allowing the Commission to take action without the procedural safeguard of a hearing is contained in Section 204 (Title II). That section authorizes the Commission to summarily suspend newly filed rates of

common carriers without a hearing but precisely confines the effectiveness of such a suspension to a period of no more than three months. Needless to say, this provision also would be unnecessary if Section 4(i) gave the Commission the authority it now claims.

Petitioners' theory of the Commission's authority to issue temporary stays reduces to the absurdity that the Commission has greater power to deal with so-called broad and implied responsibilities than it has to deal with responsibilities which the Congress has specifically defined. The Communications Act spells out in detail the areas of radio (and broadcast) regulation with which the Commission should be concerned, and just as specifically defines its enforcement powers with respect to those responsibilities. On the other hand, there is no Congressional specification of Commission responsibility for the regulation of CATV systems and (as might be expected) no definition of enforcement measures that relate to the regulation and operation of CATV systems. Nevertheless, Petitioners argue that the Commission has greater enforcement powers with respect to CATV regulation than it has with respect to radio regulation.

If a broadcast licensee should decide to flout specific statutory and administrative requirements, *i.e.*, to support a political candidate of his own choosing without providing equal time for the opposing candidate as required by the Act; to espouse one side of a controversial question without airing opposing views as required by the Commission's so-called "Fairness Doctrine"; to operate a television station without a license; or to engage in any number of other prohibited activities, the Commission's only course of action, in order to eliminate the practice, would be one of the following: Issue a cease and desist order pursuant to Section 312(b) of the Act; institute a license revocation proceeding pursuant to

Section 312(a); deny the *offender's* application for renewal of license pursuant to Section 309; or, as it might be required to do even if it first followed one of the foregoing procedural avenues, seek the assistance of the courts as provided by Sections 401, 501 or 502 of the Act.

Regardless of which of the foregoing enforcement procedures the Commission followed in connection with a radio broadcast violation, the violator would be entitled to a full evidentiary hearing prior to legal enforcement of the sanction or penalty involved. On the other hand, Petitioners argue that the operation of CATV systems, such as those of Respondents, may be summarily restrained even though the systems admittedly are being operated in full compliance with all pertinent federal legal and administrative requirements and, in a manner specifically authorized and required by local authorities.

It is submitted that it is not logical to contend, as Petitioners do, that the Congress, by complete silence, has given the Commission greater power to enforce non-specified CATV responsibilities than it provided, in extensive detail to enforce the specific mandates for radio and broadcast regulation.

In the absence of pertinent court cases interpreting The Communications Act, Petitioners are forced to rely upon two lower court cases interpreting other statutes to support their contention that the Federal Communications Commission has the power to maintain the *status quo* pending the conclusion of an *ad hoc* proceeding to determine if a permanent stay should be issued. It is clear, however, that neither of these cases support Petitioners' contention because of material differences in law and fact.

First and foremost, this Court has warned, in another context, that ". . . federal agencies are not fungibles . . . – Congress has treated the matter with attention to the

particular statutory scheme and agency." *International Union, United Automobile, Aerospace & Agriculture Implement Workers, etc. v. Scofield*, 382 U.S. 205, 15 L. Ed. 2d 272 (1965).

This warning is particularly pertinent in regard to comparisons of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C.A. §§717 *et seq.* with Title III of The Communications Act. For this reason, Petitioners' reliance on *Amerada Petroleum Corp. v. Federal Power Commission*, 293 F. 2d 572 (C.C.A. 10th, 1961), *cert. denied*, 368 U.S. 976 (1962), is completely misplaced. In that case, the lower court merely affirmed an agency decision designed to protect its administrative process. The agency dismissed a second filing of rate change while a prior rate change was being processed. Such a rule is analogous to the Commission's rule prohibiting the filing of multiple applications[29] and requires no special delegation of authority from Congress. The fact that Section 16 of the Natural Gas Act, 15 U.S.C.A. §717o (1963) is "strikingly like" the provisions of Section 4(i) of The Communications Act, can lead only to the conclusion that the Commission also has sufficient authority to adopt necessary

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29 "§1.520 Multiple applications.

Where there is one application for new or additional facilities pending, no other application for new or additional facilities, for a station of the same class to serve the same community, may be filed by the same applicant, or his successor or assignee, or on behalf or for the benefit of the original parties in interest. Multiple applications may not be filed simultaneously." (47 CFR 1.520)

procedural rules. Moreover, the facts in *Amerada* are completely different from those involved when an agency seeks to stay a lawful business pending a hearing to determine whether the public interest requires the issuance of a permanent stay. The former facts affect agency procedure alone; the latter facts affect substantive rights of other parties.

The second case relied upon by Petitioners is *R. A. Holman & Co., Inc. v. Securities and Exchange Commission*, 112 U.S. App. D.C. 43, 299 F. 2d 127 (1962), *cert. denied*, 370 U.S. 911 (1962). Again, both the statutory language and facts are different. To begin with, appellant in *Holman* did not challenge the statutory power of the Commission and the court did not have occasion to pass upon the issue. The reason for the absence of this challenge is self-evident. Section 3(b) of the Securities Act of 1933, 48 Stat. 75 (1933), as amended, 15 U.S.C.A. §77c(b) (1963), provides that the Commission may from time to time "by its rules and regulations" add any class of securities to the exempt list, if certain conditions are met. Obviously, such a grant of statutory authority carries with it the corollary power to remove securities from the exempt list when conditions for exemption are no longer present.

In addition, the facts in *Holman* and the instant case are completely different. Moreover, in *Holman*, the Court found that Congress was aware of the Commission's Rules and saw nothing therein which conflicted with the statutory purpose. However, these differences merely point up Petitioners'

fallacy in relying upon an expression of Congressional intent in one statute as evidence of the Congressional intent in enacting a different administrative statute.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

FRANK U. FLETCHER
ROBERT L. HEALD
EDWARD F. KENEHAN
JAMES P. RILEY
Attorneys for Respondents

Of Counsel:

FLETCHER, HEALD, ROWELL,
KENEHAN & HILDRETH,
1023 Munsey Building
Washington, D.C. 20004

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APPENDIX

THE COMMUNICATIONS ACT OF 1934, AS AMENDED, 66 STAT. 718, 47 U.S.C.A. 151, *et seq.*

Sec. 309. Application for license—Considerations in granting application

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Hearings; intervention; evidence; burden of proof

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor,

specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission. As amended May 14, 1964, Pub.L. 88-306, 78 Stat. 193; May 14, 1964, Pub.L. 88-307, 78 Stat. 194.

* * * * * *

Sec. 312. Administrative sanctions—Revocation of station license or construction permit

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of section 1304, 1343, or 1464 of Title 18.

Sec. 401. Enforcement of chapter and orders of Commission; jurisdiction

(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order

by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

(d) The provisions of sections 28 and 29 of Title 15, section 345(1) of Title 28, and sections 44 and 45 of Title 49 shall be held to apply to any suit in equity arising under sections 201-222 of this title, wherein the United States is complainant. June 19, 1934, c. 652, Title IV, § 401, 48 Stat. 1092; June 25, 1948, c. 646, § 1, 62 Stat. 909.

Sec. 501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by

imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both. June 19, 1934, c. 652, Title V, §501, 48 Stat. 1100; Mar. 23, 1954, c. 104, 68 Stat. 30;

Sec. 502. Violation of rules, regulations, etc.

Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs. June 19, 1934, c. 652, Title V, §502, 48 Stat. 1100.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 363

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

No. 428

MIDWEST TELEVISION, INC., WESTERN
TELECASTERS, INC., and JACK O. GROSS,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT SOUTHWESTERN CABLE CO.

MORTON H. WILNER
ARTHUR SCHEINER
HAROLD F. REIS
Landmark Building
1343 H Street, N. W.
Washington, D. C. 20005
Attorneys for Respondent Southwestern Cable Co.

Of Counsel:
WILNER, SCHEINER & GREELEY
Landmark Building
1343 H Street, N. W.
Washington, D. C. 20005

Washington, D.C. · THIEL PRESS · 202 · 393-0625

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MISCELLANEOUS:

18 FCC Ann. Rep. (1952) 32

28 FCC Ann. Rep. (1962) 32

31 FCC Ann. Rep. (1965) 32

Gellhorn, Administrative Law Cases and Comments 774 (1960) 44

Jaffe, Judicial Control of Administrative Action 662 (1965) 44

7 J. Moore, Federal Practice ¶ 65.04[3] (1966 ed.) 60

Nicholas Johnson, *CATV: Promise and Peril*, Saturday Review, November 11, 1967 35

TV Digest, Television Factbook No. 37 (1967) 8

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 363

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

No. 428

MIDWEST TELEVISION, INC., WESTERN
TELECASTERS, INC., and JACK O. GROSS,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT SOUTHWESTERN CABLE CO.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has jurisdiction under the Communications Act of 1934 to regulate non-microwave community antenna television (CATV) systems.

2. If it has, whether it may enjoin—without an evidentiary hearing or oral argument and for an indefinite and prolonged period of time—the concededly lawful operations of respondent CATV systems pending the ultimate completion of an evidentiary hearing initiated to determine whether the Commission should impose upon the operations of these particular CATV systems "additional or different requirements" than those imposed by the Commission's regulations on CATV systems generally.

STATEMENT

In view of the somewhat incomplete Statement in Petitioners' briefs, it is believed desirable to supplement them with the following relevant facts.

Introduction

Unlike AM radio signals which tend to hug the ground, television signals travel in a straight line. Because of the curvature of the earth, therefore, their normal range for good reception is limited to the horizon, usually a distance of around 70 miles. Moreover, the nature of the television signal is such that it is effectively blocked when it encounters hills or certain man-made structures.

CATV first developed in localities where satisfactory television reception was not possible through the use of normal house top antennas, either because of the distance from transmitting stations or because mountainous terrain blocked the signals. The first commercial system was started about 1950.

Originally a CATV system consisted merely of an antenna erected on a hill top and connected by cable or wire to subscribing homes. Such systems are ordinarily described as "off-the-air" or "non-microwave" systems. There are some systems, however, which are too far from television stations to receive the signals directly. They, therefore, rely on point-to-point microwave transmission to relay the signals to them. A microwave transmitter utilizes a portion of the

spectrum and therefore requires a license from the Federal Communications Commission.

All the CATV systems in the instant case are non-microwave systems, and all the signals which they carry are received directly off the air from the television stations without additional use of the spectrum.

Commission's Positions on Its Authority To Regulate CATV

The history of the Federal Communications Commission's view of its authority over CATV systems is a chronicle of vacillation and contradiction. In 1959, approximately a decade after the advent of CATV operations, the Commission first considered the question and concluded that it was without such authority—whether the CATV systems were "off-the-air" or fed by microwave. *CATV and TV Repeater Services,* 26 F.C.C. 403 (1959). On April 23, 1965, the Commission reversed its position with respect to CATV fed by microwave and asserted jurisdiction over such systems. *First Report and Order,* 38 F.C.C. 683 (1965). On March 8, 1966, the Commission completely reversed its earlier position and asserted authority over non-microwave CATV systems also. *Second Report and Order,* 2 F.C.C. 2d 725 (1966) (App. 1,[1] *et. seq.*)

This, in brief, is the record of the Commission's view of its authority to regulate CATV. A more detailed statement of these successive positions and the bases relied upon by the Commission is set forth below.

When the Commission first considered the question in 1959, it expressly concluded that it had no power to regulate CATV systems. In reaching this conclusion it consi-

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[1] "App." refers to the printed appendix filed in this court under Rule 36(1). The brief filed by the petitioners in No. 363 is referred to as "Gov't Br." and the brief filed by the petitioners in No. 428 as "Midwest Br.". In addition, there are appended to this brief five appendices designated Appendix A through E and referred to herein as "App. A", etc.

dered, among other arguments, the contention that it derived such regulatory authority over microwave CATV systems and should exercise it because of

> . . . the impact upon a television broadcaster of grant of radio facilities to a communications common carrier, where the common carrier facilities will be used for the purpose of providing communications service to a community antenna system operating in competition with the broadcaster.

The Commission dismissed the contention as follows:

> In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any non-broadcast competitive enterprise. Thus, for example, we might logically be requested to invoke a prohibition against access to common carrier facilities by such enterprises as closed-circuit music and news services, closed-circuit theater television operators, and, possible, even ordinary motion picture and legitimate stage operators, magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. *The logical absurdity of such a position requires no elaboration.*

26 F.C.C. at 431-32 (emphasis added).

This view of the matter was not long-lived. In 1962 the Commission, on the basis of a protest initiated by a local television station, denied an application of a common carrier by radio for permission to construct a microwave radio communications system to be used to transmit television signals to CATV systems serving three towns in Wyoming. It concluded that grant of the application would not serve the public interest because it would result "in the demise of the local television station and the eventual loss of service" to certain residents of the area which would not be reached by CATV. However, the denial was issued without prejudice to refiling of the application if it could be shown that the CATV operation would not duplicate the programs

carried by the local television station and would also carry the signals of the local broadcasters. In reaching its conclusion, the Commission stated: "To the extent that this decision departs from our views in the Report and Order in Docket No. 12443, 26 F.C.C. 403 (released April 14, 1959), those views are modified." *Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 465 (1962), *aff'd sub nom. Carter Mountain Transmission Corporation v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). Thus the Commission took the first step in effectuating a program—which it had earlier rejected as a "logical absurdity"—of protecting broadcasters against the economic competition of CATV.

The second step was to translate the action it had taken in *Carter Mountain* into general rules. This was done on April 23, 1965, when it released its *First Report and Order*, 38 F.C.C. 683 (1965). There the Commission also stated that it had:

> . . . determined as an initial matter that the Communications Act vests in this agency appropriate rule making authority over all CATV systems, including those which do not use microwave relay service (the so-called "off-the-air systems").

Id. at 684. However, at that time it limited its asserted authority to microwave CATV systems and deferred action with respect to off-the-air CATV systems. Further, it simultaneously issued a Notice of Inquiry and a Notice of Proposed Rule Making[2] in order to develop "an appropriate record" and to meet its "need for more definitive information." *Id.* at 685.

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[2] 1 F.C.C.2d 453 (1965). There was attached to the document a "Commission's Memorandum On Its Jurisdiction and Authority", which concluded that ". . . the Commission presently has jurisdiction over all CATV systems, whether microwave is used or not." *Id.* at 478-82. This memorandum was also appended to the Second Report and Order and appears at App. 69.

In the *First Report and Order* the Commission articulated its "belief that CATV service should supplement, but not replace, off-the-air television service." *Id.* at 705. The Commission asserted that duplication of broadcast program material by CATV systems in a local market from distant sources dilutes such audiences and is not "a fair method of competition" or "consistent with CATV's appropriate role as a supplementary service." *Ibid.* In order "to create reasonably fair and open conditions for competition between CATV and broadcasting stations . . . [and] to ameliorate the adverse impact of CATV competition upon local stations," the Commission adopted rules requiring microwave CATV systems to carry the signals of local television broadcasters and imposed "reasonable carriage and non-duplication requirements." *Id.* at 703, 714.

The next step was the adoption of the *Second Report and Order* on March 4, 1966, 2 F.C.C. 2d 725 (1966) (App. 1 *et seq.*).[3] The Commission modified its earlier issued rules and made them applicable to all CATV systems—whether microwave or non-microwave.

In essence, the *Second Report and Order* and the rules adopted therein regulate and limit the operation of CATV systems in three major respects. First, the "Compulsory Carriage" rules provide that CATV systems are required to carry the signals of local and nearby television stations if requested. Second, the "Exclusivity" rules provide that a television station with a stronger signal over the CATV community may prevent the system from carrying on the same day those programs of another station with a weaker signal which duplicate its programs.[4] Third, the "Top 100 Market"

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[3]The Second Report and Order was modified in minor respects by Memorandum Opinions and Orders adopted on April 20, 1966, 3 F.C.C.2d 400 (1966), and January 5, 1967, FCC 67-34 (App. 111).

[4]The Commission rules governing television broadcast stations recognize three grades of signal strength – Principal City Grade, Grade A and Grade B. These grades are defined in terms of the level of

rules provide that in the markets so designated—and both Los Angeles and San Diego are so designated—CATV systems may not, without Commission authorization, carry the signals of television broadcast stations unless such stations place a signal of Grade B strength over the community serviced by the CATV system.[5]

The foregoing history spells out the sharp change between 1959 and 1965 in the Commission's view of its authority to regulate CATV. It should, however, be pointed out that during that period the Commission repeatedly sought, but Congress did not enact, authorizing legislation dealing specifically with CATV.[6]

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signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade – 90%; Grade A – 70%; Grade B – 50%.

[5]Section 74.1101, *et seq.* of the Commission's Regulations. 47 C.F.R. § 74.1101, *et seq.* (1967).

[6]The history of these attempts is set out in a footnote contained in the Notice of Inquiry and Notice of Proposed Rule Making, *supra* note 2, at 464, n.13:

> Following the Report and Order in Docket No. 12443, supra, the Commission recommended that the Congress amend the Communications Act to require CATV systems to obtain the consent of the stations whose signals they transmit, and to carry the signal of the local station (without degradation) upon request. These proposals were embodied in S. 1801 and H.R. 6748, introduced in the 86th Congress, including S. 2653 (providing for the licensing of CATV systems) and S. 2303 (providing for the issuance of certificates of convenience and necessity). The Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce held hearings on these bills, and several other bills which involved CATV systems, including S. 1739, S. 1741 and S. 1886. On September 8, 1959, the Committee on Interstate and Foreign Commerce reported favorably on S. 2653. S. Rept. 923, 86th Cong., 1st Sess. In 1960, following two days of debate on the floor of the Senate (106 Cong. Rec. 10326, 10344, 10407 and 10520), S. 2653 was recommitted to the Committee on Interstate and Foreign Commerce by one vote, 106 Cong. Rec. 10547. As a

The Proceedings Here Involved

The instant proceeding relates to carriage of Los Angeles signals by CATV systems in San Diego. The latter city is the Nation's 54th television market, with approximately 352,600 television homes. Yet it has only two VHF television stations[7] (i.e., stations operating on one of Channels 2 through 13), whereas Los Angeles, about 120 miles away, has seven; San Francisco-Oakland has four; and Seattle-Tacoma has four.[8]

In those circumstances CATV can, and to the extent that it has been permitted to do so, does afford to the residents of San Diego an essential service not limited to eliminating reception problems stemming from terrain, distance and weather. It also widens the choice of television programs, such as news, panel programs, documentaries, films, sports, etc., available to viewers in San Diego. CATV service therefore began to be supplied pursuant to franchises issued by the interested communities as early as December of 1963.[9]
early as December of 1963.[9]

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result, no legislation relating to CATV systems was enacted in the 86th Congress. In the 87th Congress, the Commission proposed S. 1044 and H.R. 6840, which would have expressly authorized the Commission to issue rules for the protection of stations providing locally-originated television programs. These bills received no action. The Commission proposed no legislation to the 88th Congress, and no action was taken on any bills.

[7] Midwest Television Inc., 11 P & F Radio Reg.2d 273, 276, 281 284 (1967). (Initial Decision of Hearing Examiner, dated September 28, 1967, hereinafter cited as *Initial Decision*.) As that decision indicates, one UHF station is also in operation in San Diego and both English and Spanish programs are received on VHF from nearby Tijuana, Mexico. *Id.* at 276.

[8] TV Digest, *Television Factbook* No. 37 (1967) at 72-b-79-b, 96-b-100-b, 758-b-760-b, 765-b.

[9] *Initial Decision* 281.

Southwestern Cable Co. (hereinafter "Southwestern"), like the other respondents in this proceeding, is a CATV system operating in the San Diego, California, area. It uses a high antenna to receive the signals of Los Angeles television stations "off-the-air" and transmits them to its subscribers by cable and wire. It began such service in December of 1965 pursuant to a franchise earlier issued by the City of San Diego for a portion of the city lying north of the San Diego River channel.[10]

It is explicitly conceded by Petitioners that Southwestern, as well as the other CATV respondents, operate in full compliance with all of the substantive rules and regulations adopted by the Commission in its *Second Report and Order*. Thus, in the proceedings below before the Ninth Circuit, the Commission conceded "that none of the petitioners [respondents here] is presently in violation of the governing statutes and the Commission's rules with respect to any of the matters dealt with in the described Commission Order." (App. 182) This case arose, however, under certain so-called "ad hoc procedures" which provide, in pertinent part, that upon petition of any interested person the Commission may waive any provision of its rules "relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements." 47 C.F.R. § 74.1109(a) (1967). Subsection (f) of that regulation further provides, in pertinent part, as follows:

> In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded

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[10] As noted above, pp. 3-6, at that time the Commission had not asserted authority over off-the-air CATV systems such as Southwestern's. It was not until March 8, 1966, with the release of the Second Report and Order, that the Commission asserted regulatory authority over off-the-air CATV systems of the type constructed and operated by Southwestern and the other respondents herein.

to any party pending the hearing and the nature of any such temporary relief . . . .

On March 17, 1966, almost immediately following the issuance of the *Second Report and Order,* Midwest Television Inc. (hereinafter "Midwest"), licensee of a VHF, CBS affiliated station in San Diego, filed a petition with the Commission contending among other things that the "distant", i.e., Los Angeles, signals imported to San Diego by the respondent CATV systems "will, if allowed to expand, fragment and drastically reduce the local stations' viewing audience . . . [and cause San Diego television stations] audience losses, eventually resulting in reduced advertising revenues and curtailed local and quality programming." (App. 150) It therefore requested "essentially, that the Commission issue a final order appropriately confining carriage of Los Angeles signals by respondents' systems and that, if a hearing is necessary, the respondents be ordered . . . [as a measure of] temporary relief pending the outcome of any hearing . . . [to] *cease and desist* . . . [from extending] delivery of the Los Angeles signals to subscribers located" beyond specifically defined geographical boundaries. (App. 147-48, 152, emphasis added)

The respondent CATV systems filed responsive pleadings and contended, *inter alia,* that Midwest had failed to show that the Los Angeles signals were carried by the CATV systems beyond their predicted Grade B contour[11] and that, in fact, the signals carried provided a Grade B signal to San Diego. As a consequence, respondents asserted that they were in compliance with the "Top 100 Market" rule, Section 74.1107(a) and that under the terms of the *Second Report* and the rules, no Commission authorization was required. Respondents contended further that, in any event, they were "grandfathered" under Section 74.1107(d) of the rules and were not extending service to new geographical areas within

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[11] As a consequence, there would be no violation of the Top 100 Market rule, Section 74.1107(a).

the meaning of the proviso limiting grandfather rights. (App. 152-57) The Commission concluded that a hearing was necessary, and on July 25, 1966, it issued a Memorandum Opinion and Order (which was corrected by an erratum issued July 26, 1966) designating the matter for hearing.[12] (App. 111)

With respect to the request for a temporary "cease and desist" order the CATV systems contended that the Commission was without authority to issue such a stay for the reasons that Section 312 of the Communications Act, 47 U.S.C. § 312 (1964), constitutes the only basis for any sort of interim action pending a hearing. Subsection (b) of Section 312 confers general power upon the Commission to issue cease and desist orders for the failure to operate as licensed or to observe the terms of the Act or of "any rule or regulation of the Commission authorized by this Act." However, issuance of the order must be preceded by an evidentiary hearing unless waived, 47 U.S.C. § 312(c) (1964), at which "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission." 47 U.S.C. § 312 (d) (1964). Respondents contended further that the Commission was without power, in any event, to issue a stay of CATV operations which were in full compliance with all rules and regulations adopted by the Commission in the exercise of its asserted authority to regulate CATV systems.

The Commission conceded *arguendo* that the respondent CATV systems were operating lawfully and in compliance with the rules.[13] It concluded, however, that the imposition

[12] The order set out specific issues to be covered in the proceeding relating to the present and potential percentage of CATV service in the San Diego market, the affect or potential affect on local television stations, whether or not the expansion of the respondent CATV systems should be permitted and what, if any, action should be taken by the Commission (App. 172-73).

[13] As noted above, the Commission later made the same concession as a factual matter and without reservation, i.e., not merely "arguendo". *Supra*, p. 9.

of a stay was nevertheless warranted. The authority asserted and relied upon by the Commission was that the temporary relief provisions of Section 74.1109(f) of its rules, 47 C.F.R. § 74.1109(f) (1967), constitutes a valid exercise of the authority conferred upon it by Section 4(i) of the Act, to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act as may be necessary to the execution of its functions." 47 U.S.C. § 154(i) (1964). It also referred to similar general regulatory provisions of the Act, Sections 303(f) and 303(r), 47 U.S.C. §§ 303(f), 303(r) (1964), as support for this general authority. (App. 162-66)

Further, the Commission expressly rejected the alternative proposed by respondents that the Commission petition the Court of Appeals for an injunction restraining CATV expansion in San Diego under the authority of *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966). The Commission did not dispute that this course was available to it. The sole basis relied upon was the assertion that following such a course "would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission." (App. 177) Stressing the need to resolve "public interest considerations. . . . before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted" (App. 163), the Commission then concluded that "temporary relief is necessary and appropriate 'before the consequences *possibly adverse* to the public may develop.'" (App. 166, emphasis added) This is as far as the Commission went in finding a public necessity for its injunctive order.

On the foregoing premises, the Memorandum Opinion and Order, which was issued on the basis of the pleadings and affidavits only and without any other hearing or oral argument, ordered "temporary relief, pending final disposition of this proceeding" substantially as requested by Midwest.

(App. 170-71, 174) The order "for temporary relief" required the respondents to confine delivery of Los Angeles signals carried on their systems to subscribers within franchise areas in which they were actually operating on February 15, 1966, or to subscribers who had actually contracted for such service between February 15, 1966, and the date of the order. (App. 170-72)

Southwestern, as did the other CATV systems involved, sought review of the order in the Court of Appeals for the Ninth Circuit. That Court consolidated the actions and permitted Midwest and the other television broadcasting interests to intervene. Preliminarily, by orders dated August 8 and 10, 1966, the Court stayed those portions of the Commission's Memorandum Opinion and Order which limited and confined Petitioners' CATV operations. (See App. 181) Thereafter, by Interlocutory Injunction issued on August 23, 1966, the Ninth Circuit concluded that, as a consequence of these "temporary" restraints, Southwestern "in all probability will be unable to extricate itself from its present financial difficulties and may be forced to suspend all operations; and in any event will lose substantial and irretrievable gross income, thereby causing irreparable damage . . ."; and that irreparable damage would also be caused to the other respondents because of the loss of "substantial and irretrievable gross income . . . [and the need] to lay off a number of highly skilled workmen." Accordingly, it was ordered that the Commission's order for "temporary" relief be modified so as to permit the addition of new subscribers to CATV trunk and feeder lines actually in existence as of August 23, 1966, the date of the court's order of Interlocutory Injunction. (App. 180, 182)

On April 28, 1967, the court issued its opinion under review herein. It concluded that the Commission lacked the power to issue its order for "temporary relief" pending a hearing and, to that extent, set the order aside. (App. 144-46)

After 28 days of hearing the evidentiary proceeding designated by the Commission was concluded; and on October 3, 1967, the Initial Decision of the hearing examiner was released. In pertinent part the Initial Decision concluded:

> There is no evidence that CATV produced competition to date has had any effect whatsoever on the service offered the public by the San Diego television stations, or the ability of those stations to continue offering that service.
>
> . . . .
>
> It having been concluded that CATV expansion will have no material effect on the operation of San Diego's network affiliated VHF stations, and that its probable effect on the operation of prospective and proposed independent UHF stations is unproven, the evidence on this record furnishes no basis for the imposition of any restrictions on the present or future operation of CATV systems in the San Diego market.[14]

Therefore, subject to further review by the Commission, the Initial Decision ordered "that the limitations on the operations of respondent CATV systems imposed by earlier orders in this proceeding are removed."[15] By order released November 14, 1967, the Commission certified the matter (i.e., review of the Initial Decision) to itself for final decision.[16]

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[14] *Initial Decision* 303, 304. This decision was released by the Commission on October 3, 1967, and was transmitted to the Court by letter from the Acting Solicitor General dated October 4, 1967.

[15] *Id.* at 305.

[16] However, in his letter to the Court of October 4, 1967, the Acting Solicitor General advised that review of the Initial Decision by the Commission "is not likely to be concluded before the end of the current Term."

SUMMARY OF ARGUMENT

The regulations adopted by the Commission in its *Second Report and Order* deal in considerable detail with a wide variety of subjects such as the right of a CATV system to carry the signals of certain stations and its duty to black out the signals of other stations under certain circumstances. Other pending cases already challenge the Commission's authority to regulate CATV and various sections of the regulations, including challenges based on constitutional grounds. This case deals only with an order of the Commission which enjoined respondents' lawful CATV operations without a hearing. The single question presented is—Did the Commission have the power to issue that order? In holding that the Commission did not indeed have such power, the court below stated (App. 192):

> Our conclusion that the Commission lacked the power to issue the order in question required that the order be vacated and set aside. In light of our disposition of the case, we decline to express any opinion as to the other issues raised in this proceeding.

Accordingly, this case does not involve the validity of any of the Commission's substantive rules—"The Top 100 Market" rules or "Compulsory Carriage" rules or the "Exclusivity" rules. The validity of these substantive rules was not before the Court of Appeals for the Ninth Circuit and that court did not, of course, pass upon such matters. Therefore, even if it should be determined that the Commission does have the claimed authority to regulate non-microwave CATV, the nature and scope of such authority and the validity of the rules and regulations which the Commission has designed to effectuate such authority must await final decisions in the numerous other cases in which such matters have been raised and presented.

The basic and ultimate issue is the Commission's power to issue, without an evidentiary hearing or oral argument, an order for "temporary" relief restraining the activities of

the respondents for an indefinite period of time while it determines whether "permanent" restrictions of some unspecified nature should be imposed upon them—restrictions different from those imposed on CATV systems generally. And the issue thus posed must be answered in light of (1) the Commission's express concession that the restrained activities are wholly legal, and (2) an intervening decision, based for the first time on a trial of the facts, that the facts do not support the imposition of either "temporary" or "permanent" restraints. In view of the grounds upon which certiorari was sought and granted, however, we address ourselves first to the Commission's authority to regulate non-microwave CATV.

I

The structure of the regulatory scheme of the Communications Act is comparatively simple. Title I (General Provisions) comprises the purposes, application and definitions of the Act. The principal substantive provisions are contained in Titles II and III. Title II deals exclusively with common carriers; and Title III deals with radio.

The purpose, structure and provisions of the Act do not grant the Commission regulatory authority over CATV operations—a form of communication by wire. The Government concedes that CATV systems are not common carriers and does not contend they are engaged in radio communication. As a consequence, CATV does not fall within either of the two basic subject matters of regulation dealt with in the Act—radio and communication engaged in by common carriers.

References in Sections 1 and 2(a) of Title I of the Act to "interstate and foreign communication by wire and radio" constitute descriptions of the general subject matter dealt with in the Act. The grant of authority is expressly limited in Section 2(a) to "the provisions of this Act." Such pro-

visions are principally contained in Titles II and III and do not include wire communication conducted by non-common carriers.

The claimed power is directly contrary to the legislative history of the Act and to its long-standing administrative interpretation. Congress expressly excluded private wire communication systems from regulation under Title II, and it cannot be assumed that it, nevertheless, intended to confer such power in Sections 1 and 2(a). The Commission has never, until it asserted authority over CATV, undertaken to regulate wire communication engaged in by others than common carriers.

The Commission does not have authority to regulate the operations of network organizations and numerous other non-common carrier interstate communications activities. Although network operations have a far greater involvement with and impact upon broadcasting, the Commission has uniformly, repeatedly and explicitly disclaimed authority to regulate such operations. Its lack of jurisdiction over the CATV operations involved herein is clearly an *a fortiori* case.

The Act is devoid of any substantive or procedural standards for the regulation of non-common carrier wire communication. The claim to Commission authority over non-microwave CATVs is therefore premised on an assumed power to regulate such communication for the purpose of achieving such objectives, and by such means, as the Commission deems appropriate. The absence of standards for the regulation of non-common carrier wire communication supports the conclusion that such activity was not intended to be regulated by Congress; or that, if Congress did so intend, the delegation is unconstitutional.

The history of proposed CATV legislation in Congress discloses Congressional awareness and acquiescence in the Commission's original determination that it lacked authority to regulate CATV and that acqueiescence is entitled to great weight.

II

Assuming *arguendo* that the Commission has authority to regulate non-microwave CATV, it does not have authority to restrain lawful activity of the respondents which is conceded to comply with all rules and regulations promulgated by the Commission governing the operation of CATV systems; and to impose such restraints without evidentiary hearing or even oral argument and to continue such restraints in effect for an extended and indefinite period of time.

The claimed power to impose such restraints is a flat repudiation of due process and fair play and makes a mockery of the procedural requirements of the Administrative Procedure Act and the Federal Communications Act. Its basic premise is the validity of a "rule" (or more accurately an "anti-rule") which explicitly reserves for the Commission the claimed power to impose any and all restraints as it deems "appropriate" on any CATV system—and to do so upon such procedural terms as it chooses. Such a claim of unbridled authority must be held illegal.

Sections 4(i) and 303(r) of the Communication Act, upon which the Government relies for such implied authority, are enabling provisions only, designed to implement other substantive provisions of the Act. The legislative history of the sections makes it clear that they were conceived as narrow in scope and do not, in any event, confer authority to impose restraints of lawful activity of the type involved herein.

The power to issue a temporary restraining order claimed by the Commission is flatly repudiated by the provisions, standards and history of Section 312(b) of the Communications Act. Section 312(b) comprises the only source of injunctive power conferred on the Commission and authorizes it to issue cease and desist orders to restrain illegal activities only, in carefully circumscribed situations and upon precisely stated conditions which includes notice, specification of issues, and then only after an evidentiary hearing. The legislative history of Section 312(b) and of related enforce-

ment powers of the Commission clearly establish the care and selectivity which Congress has exercised in conferring such powers; and its failure to confer power requested by the Commission to issue temporary injunctions pending an evidentiary hearing even against alleged violators of the Act.

The authority claimed by the Commission is contrary to the uniform and consistent pattern of legislation governing executive departments and administrative agencies, which limits their injunctive and cease and desist powers by specific terms delineating precisely the criteria for the invocation of such power and the required procedures to be employed. Moreover, the injunctive power here exercised would not be exercised by courts. Accordingly, the power to enjoin here exercised is not conferred by Sections 4(i) and 303(r).

ARGUMENT

I

THE COMMUNICATIONS ACT OF 1934 CONFERS NO AUTHORITY ON THE COMMISSION TO REGULATE NON-MICROWAVE CATV SYSTEMS

The alleged basis of the Commission's jurisdiction to regulate non-microwave CATV[17] is "succinctly expressed" in the Government's brief (p. 29) as follows:

> CATV constitutes interstate communication by wire (47 U.S.C. 152(a), 153(e)) since the systems physically intercept and extend television signals. By so

[17] As the Commission has pointed out, there exists an "obvious distinction" between microwave and non-microwave CATV systems in "that nonmicrowave CATVs do not file applications for licenses with the Commission or use licensed facilities. . ." (App. 42) As a consequence, the legal problems relating to Commission authority over each of these forms of activity differ. Since all of the respondents are non-microwave systems, only Commission authority over non-microwave CATV systems is here involved. This is expressly recognized in the Government's statement of the first question presented. (Gov't Br. 2)

> doing, they directly affect and threaten to disrupt the allocation plan for off-the-air television service established by the Commission under the Act (47 U.S.C. 303(h) and (s), 307(b)). CATV is therefore subject to the Commission's general regulatory powers (47 U.S.C. 154(i), 303(f) and (r), 312(b)).

This argument is wholly dependent upon the assumption that CATV constitutes "interstate communication by wire" and therefore falls under the authority vested in the Commission. The argument refers to the fact that Sections 303(h) and 307(b) of the Act, 47 U.S.C. §§ 303(h), 307(b) (1964), empower the Commission "to establish areas or zones to be served by" radio stations and to provide for a "fair, efficient, and equitable" distribution of radio services "among the several States and communities." It notes that Section 303(s)[18] was enacted to effectuate the policy of encouraging local broadcasting by authorizing the Commission to require television receivers shipped in interstate commerce be equipped to receive UHF transmission (Gov't Br. 31-32). Finally, it refers to Sections 4(i), 303(f) and 303(r), 47 U.S.C. §§ 154(i), 303(f), 303(r) (1964), general provisions conferring authority upon the Commission to perform acts, make rules and regulations, prescribe restrictions and conditions and issue orders.

The Commission's assertion of jurisdiction over CATV, based on claimed authority over "interstate communication by wire" explicitly disavows reliance on the Commission's authority to regulate common carriers under Title II of the Act.[19] On the contrary, the Commission has expressly re-

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[18] 47 U.S.C. § 303(s) (1964). This is the so-called All-Channel Receiver Law. Pub. L. No. 87-29, 76 Stat. 150 (1962).

[19] This position was reiterated expressly in the Government's petition for certiorari, which stated (at p. 12):

> But the scope of the Commission's regulatory authority under the Communications Act is not confined solely to certificated common carriers and broadcast licensees. It extends to "*all* interstate and foreign communication by wire

jected the view that CATV systems are common carriers. *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966). It is also conceded that CATV is not engaged in broadcasting and that, therefore, its activities do not constitute unauthorized rebroadcasts in violation of Section 325(a) of the Act, 47 U.S.C. § 325(a) (1964). See Gov't Br. 33, n. 26.

Nor does the Government contend that CATV constitutes "radio communication." Midwest does so contend. (Midwest Br. 23) The suggestion was considered and rejected by the Commission when it originally decided it had no authority to regulate CATV. *CATV and TV Repeater Services*, 26 F.C.C. 403, 428-29 (1959). It was again discussed in the Commission's Memorandum On Its Jurisdiction and Authority, 1 F.C.C.2d 453, 478-82, issued on April 23, 1965, as an attachment to the *Notice of Inquiry and Notice of Proposed Rule Making* which initiated the *Second Report and Order*. However, when the Commission issued the *Second Report and Order* on March 4, 1966, almost one year later, it relied for its claim to jurisdiction solely on its view that CATV constitutes communication by wire. (App. 4-5) In these circumstances the contention that CATV also constitutes communication by radio cannot be considered here. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).[20]

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* * * and to all persons within the United States engaged in such communication, 47 U.S.C. 152(a)."

(Emphasis in original; footnote omitted.)

[20] The Radio Act of 1927, from which Title III of the Communications Act derived, was directed at the elimination of confusion, chaos and conflicting use of the radio spectrum. National Broadcasting Co. v. United States, 319 U.S. 190, 211-13 (1943). But CATV does not involve use of the spectrum, and the Act contains no standards for the regulation of this type of communication. However, if CATV were determined to constitute interstate communication by radio, substantially more difficult problems than any yet suggested could

A. History and Structure of the Communications Act of 1934.

Prior to 1934 the authority over radio communications now exercised by the Federal Communications Commission under Title III was exercised by the Federal Radio Commission pursuant to the Radio Act of 1927, 44 Stat. 1162. At that time the Interstate Commerce Commission regulated communications common carriers pursuant to the Interstate Commerce Act.[21] 41 Stat. 475. Section 1 of the Communications Act, 47 U.S.C. § 151 (1964), makes it clear that the purpose of the Communications Act was to vest in one central body the authority formerly exercised by separate agencies with different statutory grants in one statute administered by one agency,[22] and additionally to confer certain specified new authority upon the agency so established.[23]

Before the enactment of the Communications Act, only common carriers had been regulated under the Interstate

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arise concerning the Commission's present system of leaving a large measure of regulation to State and local authorities. The regulatory scheme for interstate communication by radio preempts the field and is "exclusive of State action." Allen B. Dumont Laboratories, Inc. v. Carroll, 184 F.2d 153, 155 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951).

[21] In addition, the Postmaster General had certain jurisdiction over common carriers. S. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934).

[22] *Ibid.*

[23] For example, Section 307(b), 47 U.S.C. § 307(b)(1964), as originally enacted was a new provision authorizing the issuance of additional licenses for stations not exceeding 100 watts in power. Similarly, Sections 325(b) and 325(c), 47 U.S.C. §§ 325(b), (c) (1964), were new provisions designed to give the Federal Communications Commission control over broadcast studios in the United States used to furnish programs to be broadcast to the United States from a foreign country. See S. Rep. No. 781, *supra*, at 6, 8; H.R. Rep. No. 1918, 73d Cong., 2d Sess. 48, 49 (1934).

Commerce Act. The relevant provisions of that Act were repealed by Section 602(b) of the Communications Act, 47 U.S.C. § 602(b) (1964), and were reenacted as Title II of the latter act. Only radio communication had been regulated pursuant to the Radio Act of 1927, which was repealed by Section 602(a) of the Communications Act, 47 U.S.C. § 602(a) (1964), and was essentially reenacted as Title III.

The structure of the Communications Act is comparatively clear. Title I 47 U.S.C. §§ 151-155 (1964), is entitled "General Provisions". It sets forth the purposes of the Act, establishes the Commission, defines the terms used and contains familiar organizational provisions. Section 1, Title I, is captioned "Purposes of Act, Creation of Federal Communications Commission". It states that "[f]or the purpose of regulating interstate and foreign communication by wire and radio", and for related purposes, "there is hereby created a commission to be known as the 'Federal Communications Commission'." Section 2(a), Title I, is captioned "Application of Act" and states that "*[t]he provisions of this Act* shall apply to all interstate and foreign communication by wire." (Emphasis added). Title II, 47 U.S.C. §§ 201-22 (1964), is entitled "Common Carriers" and deals only with common carriers "engaged in interstate or foreign communication by wire or radio," 47 U.S.C. § 201. Title III, 47 U.S.C. §§ 301-97 (1964), is entitled "Special Provisions Relating to Radio". Its purpose is set forth as, "among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission," 47 U.S.C. § 301. Title III confers broad powers upon the Commission to regulate radio transmission, including the power to issue radio station licenses, 47 U.S.C. §§ 303(e), 307(a); and licensing pursuant to the standard of "public convenience, interest, or necessity" is the basic instrument for the exercise of those powers. *Regents v. Carroll*, 338 U.S. 586, 597-98 (1950).[24]

[24] The remaining titles of the Act which are not pertinent to the questions presented, are captioned "Procedural and Administrative

Non-common carrier wire communication, whether or not interstate, does not fall within either of the two basic subject matters of regulation dealt with in the Act. It is not under Title II unless it is wire communication engaged in by a common carrier. Even if it should be conceded that CATVs engage in interstate wire communication, the Commission's consistent holdings that they are, nevertheless, not common carriers operates to exclude them from regulation under Title II. Similarly, CATVs are not subject to regulation under Title III because they are not engaged in radio communication.

B. Commission Regulation of Interstate Wire Communication by Non-Common Carriers

Once it is recognized that—whatever else CATV may be—it is neither a common carrier, nor engaged in radio transmission, it inevitably follows that CATV falls outside the regulatory areas defined in Titles II and III of the Communications Act whether or not it has interstate impact.[25]

Provisions" (Title IV; 47 U.S.C. §§ 400-10), "Penal Provisions" (Title V; 47 U.S.C. §§ 501-10) and "Miscellaneous Provisions" (Title VI; 47 U.S.C. §§ 6010xxx VI; 47 U.S.C. §§ 601-07).

[25]The contention that CATV systems, such as the respondents, whose operations are confined within a single state are nevertheless engaged in "interstate" communication by wire is subject to considerable question. Section 2(b) of the Act, 47 U.S.C. § 152(b) (1964), expressly precludes Commission jurisdiction even over carriers "engaged in interstate or foreign communication solely through facilities connected with the facilities of another carrier" not under common control or "solely through connection by radio, or by wire and radio, with facilities located in an adjoining State or in Canada or Mexico . . . of another carrier" not under common control. In his separate opinion, concurring in part and dissenting in part to the First Report and Order, Commissioner Loevinger concluded from Section 2(b) and similar limitations contained in Sections 214, 221(b) and 301(d) of the Act, 47 U.S.C. §§ 214, 221(b), 301(d) (1964), that the intent of Congress was ". . . to deny the Commission jurisdiction over intrastate carriers which are not part of a single integrated system and which simply carry signals emanating from another State." First Report and Order, 38 F.C.C. 683, 753-54 (1965).

Petitioners point out, however, that the term "communication by wire" in Sections 1 and 2(a) of the Act, is not limited to common carriers. And it is the use of the term in these sections which is relied upon by petitioners for the assertion of Commission authority over CATV; and that such references in the Act constitute a separate and independent grant of authority to regulate CATV activities. (Gov't Br. 29, 36; Midwest Br. 22, 30)

Stated otherwise, the linchpin of the petitioners' contention is that Section 2(a) of the Act confers authority over CATV as an activity in "interstate wire communication"; and, since the Commission has determined that CATVs are not common carriers, that it has authority to regulate such non-common carriers engaged in wire communication. If it does not have the claimed authority to regulate such non-common carriers the entire argument falls.

It is submitted that this essential basis of the Commission's claim to authority over CATV systems cannot be supported—that, on the contrary, under Section 2(a) of the Act the Commission does not have authority to regulate CATVs engaged in wire communication and that this is so whether or not the wire communication is interstate. This is manifest from the explicit terms of Section 2(a), which limit the Commission's authority to the "provisions of this Act"; the absence of any such "provisions", substantive or procedural, or authority relating to interstate wire communication by non-common carriers in general and CATV in particular; the legislative intent; and the history of the Act's administration.

Section 2(a) states only that the "provisions of this Act shall apply . . . to all interstate and foreign communication by wire," but does not describe which *provisions* apply, in which circumstances, under what terms, or to what extent. Such a delineation of authority—essential to valid delegation to an administrative agency—is set out in the other provisions of the Act. It is indisputable, based on a searching and meticulous examination, that the Act is devoid of *any*

single provision granting regulatory authority over non-common carriers engaged in wire communications.[26] The absence of any such regulatory provisions relating to non-common carriers engaged in wire communications, when contrasted with the comprehensive regulatory regime governing radio and common carriers spelled out in detailed provisions implementing Section 2(a), clearly reveals the purpose of the Act to regulate common carriers, but not to regulate non-common carriers engaged in wire communication.[27]

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[26] For this reason cases such as National Broadcasting Co. v. United States, 319 U.S. 190 (1943), and American Trucking Assn's v. United States, 344 U.S. 298 (1953), emphasized by the petitioners (Gov't. Br. 37-38; Midwest Br. 27-28) and by the District of Columbia Circuit in Buckeye Cablevision Inc. v. FCC, No. 20274 (D.C. Cir., June 30, 1967), are irrelevant. Those cases dealt only with the scope of regulatory authority over persons or entities (e.g., motor carriers and radio station licensees) already recognized to be subject to some regulatory authority. They are not precedents with respect to the extension of administrative authority to entities or persons not covered by the relevant statute at all.

[27] The terms "wire communication" or "communication by wire" appear in a number of sections of the Act other than Sections 1 and 2(a). Thus one or the other term is used in a number of the provisions of Title II, however only in connection with common carriers. Moreover, the terms may also be found in Sections 2(b), 3(a), 3(e), 4(b), 4(k), 4(o), 406, 410(a), 412, 502, 503(a), 602(b), 602(d), 604(c), 605 and 606 of the Act, 47 U.S.C. §§ 152(b), 153(a), 153(e), 154(b), 154(k), 154(o), 406, 410(a), 412, 502, 503(a), 602(b), 602(d), 604(c), 605, 606 (1964). A number of these provisions are also expressly confined in their impact to common carriers, e.g., Sections 406, 503(a) and 604(c). Others do have a direct or indirect impact upon non-common carrier wire communication. Section 605 prohibits wire tapping and is not limited to common carrier communication. Section 606 confers certain emergency powers upon the President – not upon the Commission – with respect to all forms of wire communication, but "during the continuance of a war" only. The limitation on financial interests of Federal Communication Commissioners, contained in Section 4(b), is not limited to interests in common carriers. Section 4(k) requires the Commission to make annual reports to Con-

In fact the Act confers upon the Commission only three functions with respect to wire communications generally, i.e., functions not limited to common carriers. Section 4(o), 47 U.S.C. § 154(o) (1964), directs the Commission to "investigate and study" problems relating to the maximum effective "use of radio and wire communication . . . [as they relate to the] safety of life and property." And Section 4(k), 47 U.S.C. § 154(k) (1964), directs it to make annual reports to Congress and provides that the reports shall contain "specific recommendations as to additional legislation" and are to contain information collected by the Commission "of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication." The limitation of an agency's function with respect to a specific subject matter to study, investigation and recommendation to Congress is familiar. *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 505 (1949). In addition, Section 605, 47 U.S.C. § 605 (1964), prohibits wire tapping with respect to "any interstate or foreign communication by wire or radio," and the Commission has comprehensive regulatory powers to effectuate that prohibition. *Benanti v. United States*, 355 U.S. 96 (1957). These three functions do not, of course, establish a general system for the regulation of non-common carrier wire communication.

The legislative history of the Act expresses the clear and unequivocal intent not to confer on the Commission regulatory authority over non-common carrier wire communication. The statement of the managers on the part of the

gress containing information that the Commission may consider "of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy." Similarly, Section 4(o) directs the Commission to investigate and study matters relating to "the use of radio and wire communications in connection with safety of life and property." Section 3(a) is merely a definition and serves only the normal purpose of a statutory definition. Thus these references to "wire communication" or "communication by wire" contained in the Act clearly establish no general system for the regulation of non-common carrier wire communication.

House, included in the Conference Report, noted that the Senate version of Section 3(h), 47 U.S.C. § 153(h) (1964),[28] had been adopted and stated:

> It is to be noted that the definition does not include any person if not a common carrier in the ordinary sense of the term, *and therefore does not include press associations* or other organizations engaged in the business of collecting and distributing news services which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service under varying arrangements, establishing the service to be rendered, the terms under which rendered, and the charges therefor.

H.R. Rep. No. 1918, 73d Cong., 2d Sess. 45-46 (1934) (emphasis added).[29] To treat Sections 1 and 2(a) as independent sources of regulatory authority would require a conclusion that the draftsmen smuggled authority into those sections which they deliberately excluded from Title II.[30]

Nor may it be argued that the Commission's asserted power over CATV differs from its clear lack of authority over the press and other non-common carriers engaged in communication by wire for the reason that such groups are not involved in and do not have an impact on broadcasting. The fact is that radio and television networks are similarly

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[28] Section 3(h) of the Act provides that " 'common carrier' or 'carrier' means any person engaged for hire, in interstate of foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[29] See also H.R. Rep. No. 1850, *supra* note 21, at 2, to the same effect.

[30] In this connection it is noteworthy that CATV systems carry and originate news programs.

engaged in communication by wire, and their involvement with and impact upon broadcasting in general and television in particular is profound. And it is also the fact that the Commission has not asserted jurisdiction over networks. On the contrary, the Commission has repeatedly and explicitly disavowed authority over the networks. Thus, in *Don Lee Broadcasting System*, 5 P&F Radio Reg. 1179, 1197-98 (1949), the Commission stated:

> The network regulations are designed to insure that control of the individual stations is not forfeited to a network organization with which such stations are affiliated. The networks, as such, are not licensed by the Commission and are under no statutory obligation to serve the public interest. The Chain Broadcasting Regulations, therefore, are designed to govern the conduct of the individual stations rather than the networks . . . .

The analogy between CATV operations over which the Commission has presumed to assert authority, and network operations where the Commission has disavowed authority is striking, and on "all-fours". Networks are engaged in transcontinental communication by wire for the purpose of "carriage" of television broadcast programs.[31] The availability of network programs and indeed the availability of network affiliation agreements is frequently crucial to the difference between success and failure of television broadcast operations and particularly UHF station operations.[32]

[31] It is irrelevant to the question presented that networks lease lines from telephone common carriers. But in any event many CATV systems also lease lines from the same companies and for the same purpose. And the Commission in asserting jurisdiction over CATVs does not distinguish between systems which own and those which lease their lines.

[32] "The inability of most UHF stations to obtain network affiliation, or, if affiliated, to obtain sufficient network commercial programs was an important factor in the limited development of the UHF service." Network Broadcasting, Report of the Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Cong., 2d Sess. 226 (1958). See also App. 46-47, 50, 52, 54-55, 59.

Regulation of networks by the Commission could be a highly effective means of attaining Commission objectives not otherwise attainable, including its allocation plan for off-the-air service and service to local communities. One direct means of encouraging UHF broadcasting would be a requirement that networks accept as affiliates a certain percentage of UHF broadcasters.

The Commission, however, has never asserted that its general regulatory powers may be exercised upon the networks in order to foster its plan for allocation of television service.[33] Instead, it has expressly advised Congress that "The Commission has no jurisdiction over networks as such and the Commission does not have authority to license or regulate networks"[34] and that the Commission "cannot reach networks directly".[35] When it has deemed it desirable to exercise direct regulatory authority over networks, it has sought such authority from Congress.[36] Based on fact, logic

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[33] Thus, the chain broadcasting regulations involved in National Broadcasting Co. v. United States, *supra*, note 26, were "addressed in terms to station licensees and applicants for station licenses" and not to networks. 319 U.S. at 198.

[34] H.R. Rep. No. 1297, 85th Cong., 2d Sess. 628 (1957).

[35] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, *Responsibilities of Broadcasting Licensees and Station Personnel*, 86th Cong., 2d Sess. 672 (1960).

[36] With the support of the Commission, two bills were introduced in the 86th Congress. One was H. R. 5042 (entitled in part "A Bill To Amend the Communications Act of 1934 To Subject Television Networks to Certain Controls"), and the other was H. R. 11340 (entitled in part "A Bill To Amend the Communications Act of 1934 . . . To Provide for the Regulation of National Networks"). H.R. 5042 provided authority for the Commission to make rules and regulations directly applicable to the television networks, while H. R. 11340 provided for the exercise of regulatory authority over the networks under a mandatory system of licensing national net-

and law, the assertion by the Commission of jurisdiction over CATV and the explicit disavowal of jurisdiction over networks is a flat and absolute contradiction. And the assertion of jurisdiction over CATVs cannot be defended in the light of the Commission's opposite answer over the course of more than three decades to the identical question presented with respect to networks. On the contrary, since the Commission has not presumed to claim jurisdiction over the networks which are the lifeblood of broadcast operations, how can it validly assert such authority over CATV?

The compelling conclusion that the Commission does not have authority over wire communication by non-common carriers also is supported by the consistent and uniform practice of the Commission in other areas over an extended period of time. For years non-common carrier wire communication systems have been in extensive use and have not been subjected to regulation by the Commission. In addition to the press services, hundreds of thousands of miles of private non-carrier communication systems have been operated (some as early as 1851) by railroads, electric power, petroleum and natural gas pipeline companies with rights of way or similar facilities which make it practical for them to do so. See *AT&T (Railroad Interconnection)*, 32 F.C.C. 337 (1962). The railroad industry alone maintained over 200,000 miles of pole line in 1957.[37] Yet the Commission has never—before it asserted authority over CATV—undertaken to regulate the operation of such systems.[38] Thus, while the an-

works. Each was designed to give the Commission specific regulatory authority over the networks. See H. R. Rep. No. 281, 88th Cong., 1st Sess. 149-50 (1963). Neither bill was enacted, and similar legislation, introduced in the 87th Cong., 1st Sess. as S. 2400, also failed of enactment.

[37] See In the Matter of Allocation of Frequencies in the Bands Above 890 mc, 27 F.C.C. 359 (1959).

[38] The only area affecting such private wire communication systems which the Commission undertakes to regulate relates to whether the practices of common carriers, subject to Commission authority, per-

nual reports of the Commission make reference to Sections 1 or 2(a), the functions they describe include only the regulation of common carriers and radio communication; they do not refer to non-common carrier wire communication.[39]

C. The Communications Act Provides None of the Required Substantive and Procedural Standards for Regulation of Wire Communication by Non-Common Carriers.

The structure of the Communications Act is such that the assumption that the Commission has authority to regulate non-common carrier forms of wire communication leaves it wholly without statutory standards for the exercise of the authority. In sharp contrast, the Act does contain both general and detailed standards for the regulation of radio communication and common carriers. The licensing power which the Commission exercises with respect to radio under Title III must be administered in the "public interest, convenience, or necessity", a standard found adequate in *Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co.*, 389 U.S. 266, 285 (1933), and *National Broadcasting Co. v. United States*, 319 U.S. 190, 226-27 (1943), in the light of its context, the purposes of the Act and the requirements it imposes. Similarly, the standards used for the regulation of common carriers pursuant to Title II are familiar and adequate for public utility regulation.[40] These general standards are given flesh in numerous provisions of the Act

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mitting or denying the private wire communication systems to interconnect with the carriers are discriminatory. AT&T (Railroad Interconnection), 32 F.C.C. 337 (1962). This, of course, represents a regulation of the carriers, not of the non-carrier wire communication system seeking interconnection.

[39] See, *e.g.*, 18 F.C.C. Ann. Rep. 13, 15 (1952); 28 F.C.C. Ann. Rep. 15 (1962); 31 F.C.C. Ann. Rep. 10 (1965).

[40] *E.g.*, Section 201 requires charges, practices, etc., to be "just and reasonable" and Section 214 requires certificates of "public convenience and necessity" for common carrier operations.

dealing with substantive, procedural and remedial matters relating to the regulation of common carriers and radio communication. Those provisions incorporate the basic legislative standards governing the regulatory authority conferred on the Commission. They specify with care, precision and detail the substantive and procedural criteria for regulation under Title II[41] and under Title III.[42]

Moreover, the Act expresses an explicit concern with areas of radio and common carrier activities excluded from regulation by the Commission and, therefore, subject to regulation by the states.[43] An assertion of plenary Commission jurisdiction over CATV based solely upon the language of Sections 1 and 2(a) must assume that Congress was wholly unconcerned with problems relating to the appropriate areas of state and federal regulation over non-common carrier wire communication. This assumption flies in the face of its dis-

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[41] *E.g.*, unjust and unreasonable discriminations, 47 U.S.C. § 202(a); the use of franks and passes, 47 U.S.C. § 210(a); adequacy of facilities, extension of lines and public offices, 47 U.S.C. § 214(d); required records and depreciation practices, 47 U.S.C. § 220(a)(b); length of suspension of new charges, and hearing requirements, 47 U.S.C. § 204; court injunction involving reductions or extensions of service, 47 U.S.C. § 214 (c); cease and desist authority, 47 U.S.C. § 205(a); claims for damages in proceedings instituted either in the courts or before the Commission, 47 U.S.C. §§ 206, 207, 208 and 209.

[42] *E.g.*, classification of radio stations, including areas and zones served and power and time of operation, 47 U.S.C. § 303; restrictions on grants to aliens, 47 U.S.C. § 310; operation of transmitting apparatus by licensed operators, 47 U.S.C. § 318; standards for distribution of licenses, frequencies, hours of operation and power among the several states and communities, 47 U.S.C. § 307(b); terms of licenses and standards, as well as procedural requirements governing renewals, 47 U.S.C. § 307(d); and substantive and procedural conditions governing modification, suspension and revocation of licenses, 47 U.S.C. §§ 303(f), 303(m), 312 and 316.

[43] See note 25, *supra*.

closed and explicit concern with respect to radio and common carrier regulation.

No such similar panoply of substantive and procedural provisions may be found in the Act with respect to wire communication engaged in by non-common carriers. The general regulatory provisions relied upon by the petitioners qualify the power granted with limitations such as "not inconsistent with this Act, as may be necessary in the execution of [the Commission's] *functions*" (Section 4(i)); "not inconsistent with law as it may deem necessary . . . to carry out the *provisions* of this Act" (Section 303(f)); "or as may be necessary to carry out the *provisions* of this Act" (Section 303(r), emphasis added). However, with respect to non-common carrier wire communication there are no "provisions of this Act" or Commission "functions" defined elsewhere in the Communications Act to give meaning or limit to these general regulatory powers. And in the absence of any substantive and procedural authority or limitation, the petitioners' argument is reduced to the contention that the Commission has the jurisdiction to regulate CATV, i.e., wire communication conducted by non-carriers, for such purposes and by such means as it may consider appropriate.

A further difficulty with petitioners' position is that it chooses from only one of the multitude of objectives contained in the Act, some of which relate to radio communication and some of which relate to common carriers, to provide the required standards. The *Second Report and Order* discloses that the Commission made the deliberate judgment that CATV should operate as a subordinate or auxiliary to television broadcasting and that the development of CATV should be limited by this objective. (App. 22) The virtually explicit premise of the objective which it chose was to protect and insulate from competition the broadcast industry which it does have the power to regulate. On the legal theory proposed, the Commission might have been equally free to choose entirely different objectives as the bases for regulation.

The Government asserts:

> Once the nature of CATV and its potential impact on broadcasting is comprehended, it is virtually self-evident that the administrative agency charged by Congress with the regulation of broadcasting, and endowed with sweeping authority to perform that function, has jurisdiction to regulate this new and significant development in the communications field.

(Gov't Br. 28) On this theory the Commission might have concluded with equal "validity" that the mandate of Section 307(b) of the Communications Act, which provides for a "fair, efficient and equitable distribution of radio service", requires that television broadcasting be curtailed and replaced by CATV in order to conserve valuable spectrum space. Alternately, the Commission could have with equal "logic" chosen to regulate CATV in such a manner as to supplement common carrier service but to curb any threat it may present to communication common carriers.[44] The availability of such a wide choice of regulatory objectives amounts to no statutory standard whatsoever.

Even if it were possible to conclude that Sections 303(h) and 307(b) provide a substantive standard of some sort, no procedural standards whatsoever are provided for the regulation of non-common carrier wire communication. In the

[44] In a recent article one of the Federal Communications Commissioners has pointed out that CATV has significant future potential to provide new communication services, such as printing of newspapers at home, shopping from home, and specialized teaching at home and by originating programming to meet special areas of interest. In this connection, he points out that CATV "might be a vigorous and useful check on the big telephone monopolies", but that it is unlikely that its future will "be as splendid as all this . . . Its fate is now being determined in a grim political and economic struggle with the giant interests whose prosperity and power it has challenged – the broadcast industry and the telephone companies." Nicholas Johnson, *CATV: Promise and Peril.* Saturday Review, November 11, 1967, p. 87.

area of radio and common carrier regulation procedural provisions of the Act operate to give meaning and assure procedural due process in the Commission's exercise of the delegated regulatory powers. To choose but two examples, radio stations licenses may be modified under Section 316 of the Act, but that provision requires a prior hearing on request. Similarly, the Commission is authorized under Section 214(d) of the Act to require a carrier to improve its service by providing adequate facilities, extending lines, etc. However, that provision requires a prior "full opportunity for hearing".

The complete absence of either procedural or substantive standards for the asserted authority to regulate CATV as a non-common carrier wire communication activity permits only one of two possible conclusions. The first is that even if Congress may have intended the Commission to exercise regulatory authority over such activity, the attempted delegation is unconstitutional for lack of standards. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The second is that the lack of standards evidences Congress' intent that such activities not be regulated. The latter conclusion is wholly consistent with the legislative history and structure of the Act.

D. The Commission's Claim to Regulatory Authority Over Non-Common Carrier Wire Communication Is Wholly Inconsistent With Its Historic Administrative Practice.[45]

Neither the Government nor Midwest attempts to argue that the provisions of the Act they cite and which confer substantive powers upon the Commission, even when combined with the general regulatory provisions, authorize it to regulate activities or entities not otherwise subject to Commission jurisdiction. Nor can that contention be made. This is the essential holding of *Regents v. Carroll*, 338 U.S. 586 (1950), which confirmed the power of the Commission to require a radio licensee (i.e., a subject of its regulatory authority) to disaffirm a contract as a condition of renewal of license. However *Regents* also held that this authorized action of the Commission could not operate to prevent the other party to the contract—a non-licensee—from obtaining appropriate relief for the breach of contract. Indeed, if the law were otherwise it would operate to extend the Commission's jurisdiction to activities which may be so conducted as to have an incidental or even direct impact upon the Commission's allocation plan for off-the-air television service, but which are beyond the Commission's competence to regulate—e.g., the production and distribution of motion pictures, the activities of the press, broadcasting network practices,[46] or before the All-Channel Receiver Law, 47 U.S.C. § 303(s) (1964), was enacted, the shipment of television sets in commerce.

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[45] Microwave relay systems are clearly a form of radio communication. In consequence, cases dealing with Commission jurisdiction over such systems, e.g., *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963), and *Idaho Microwave, Inc. v. FCC*, 352 F.2d 729 (D.C. Cir. 1965), are irrelevant. Moreover, in each case the microwave service involved was a common carrier.

[46] See *supra*, pp. 28-31.

As Petitioners point out, the inability until recently of most television sets to receive UHF signals represented a formidable obstacle to the development of UHF broadcasting and therefore to effectuation of the Commission's assignment plan. (Gov't Br. 5, 32; Midwest Br. 5) However, the Commission made no attempt to contend, as it has with respect to CATV, that interstate shipment of sets equipped to receive only VHF affected and threatened to disrupt its plan for off-the-air television service and therefore is subject to the Commission's general regulatory powers. Rather, as it did with respect to networks, and CATV[47] it requested legislation, empowering it to deal with the problem. In so doing it frankly stated:

> In the Communications Act of 1934, Congress vested the Federal Communications Commission with the responsibility of making available to all people of the United States, an efficient and nationwide communications service, and certain authority to carry out these responsibilities. Our request for this legislation is an expression of our feeling that in the area of television reception systems, our present authority is not commensurate with our responsibilities . . .[48]

In sum, the Commission regards CATV as a form of wire communication, but not as one conducted by common carriers; since, as demonstrated above, no provisions of the Act confer general regulatory authority over non-common carriers engaged in wire communication, the Commission lacks authority over the subject matter.

Accordingly, if the Commission considers regulations appropriate it must seek authority and direction from Congress. And, in fact, after concluding that it lacked regula-

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[47] See p. 20, *infra*, and App. A.

[48] Hearings on H.R. 8031 Before the House Committee on Interstate and Foreign Commerce, 87th Cong., 2d Sess. 7-8 (1962).

tory authority in 1959, *CATV and Repeater Services*, 26 F.C.C. 403 (1959), the Commission did seek appropriate legislation. The continuing and repeated efforts to obtain such legislation are set forth in Appendix A hereto.[49] The Commission's failure to obtain such legislation strongly suggests a Congressional awareness and acquiescence in the Commission's 1959 determination that it lacked such jurisdiction.[50] This acquiescence is entitled to great weight. *United States v. Leslie Salt Co.*, 350 U.S. 383, 396-397 (1956). See also *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1956).

The precise question here presented is whether non-microwave CATV may, as a form of wire communication conducted by non-common carriers, be regulated by the Commission pursuant to the Communications Act. It is submitted that the foregoing discussion amply supports the conclusion that the Communications Act confers no general regulatory authority over such wire communication upon the Commission and that, therefore, CATV is not subject to such regulation.

This conclusion obviously does not preclude an act of Congress conferring regulatory authority over CATV upon the Commission or some other body. Moreover, such legislation would supply answers to a host of questions which an assumption of plenary jurisdiction under Sections 1 and

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[49] The Commission's description of these efforts through the 88th Congress are set forth at note 6, *supra*. Appendix A also describes the legislative treatment of CATV in the 89th Congress and discloses that nothing has since occurred to indicate the existence of any different Congressional view.

[50] Such efforts to obtain legislation are pursuant to the mandate of Section 4(k)(1) of the Act to make annual reports to Congress on "such information and data collected by the Commission as may be of value in the determination of questions connected with the legislation of interstate and foreign wire and radio communication and radio transmission of energy" and Section 4(k)(5) to make "specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable."

2(a) give rise, including: Shall CATV be licensed and if so, by whom and for what period? Shall CATV systems pay a franchise fee or rather, as in broadcast, shall the license be granted free? Shall the rates charged by CATV to the viewer be regulated and if so, by whom and upon what basis?

Although the Commission has undertaken to answer some of these questions and refrained from answering others, its claim to plenary jurisdiction necessarily involves a claim of authority to answer all. The answers which it has furnished have been supplied without any statutory guidance or direction and are at variance with the explicit directions of Congress in conferring authority on the Commission under Titles II and III.

II

THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ISSUE THE RESTRAINING ORDER HERE INVOLVED

The order here involved, characterized by the Commission as one for "temporary relief", has imposed, without an evidentiary hearing, a prolonged restraint on the activities of the respondents which are concededly wholly legal and not in violation of any Commission regulation concerning the operation of CATV systems.

Reduced to its essentials, the contention of the petitioners is that the Commission has the power to issue a "rule", 47 C.F.R. § 74.1109 (1967), which explicitly provides that the Commission may ignore, modify, alter or revise all of its other CATV rules with respect to any particular CATV system—and that it may do so in any manner it chooses. It is conceded, however, that under the statutory provisions relating to cease and desist orders the Commission does not have the power to issue a temporary restraint against unlawful activity without a hearing. Yet here the Commission contends that it does have the power to restrain activity without a hearing when that activity *is* lawful.

Sections 4(i) and 303(r), general regulatory provisions of the Communications Act, are the only authority cited as

supporting the Commission's power to impose the restraint here involved.

The contention assumes that the Commission does have authority to regulate non-microwave CATV systems and falls in any event if, as is argued in Point I of this brief, it does not have such authority. However, the powers which the petitioners read into Sections 4(i) and 303(r) could affect far more than CATV, and could well govern other activities subject to regulation under the Communications Act. The extraordinary nature of the power exercised is analyzed below.

A. The Nature of the Restraints Involved.

The Commission's view of the nature of the restraint involved herein is set forth in its Memorandum Opinion. (App. 146) The Government's Brief contributes little to clarify the nature of the action taken by the Commission. It asserts that such temporary relief was not intended as a sanction for a violation of laws or Commission rules. (Gov't Br. 51) It asserts that the instant stay is a necessary interim measure while the Commission "is attempting to establish, in an evidentiary proceeding, a rule for the conduct of regulated activity in a particular market . . . The agency itself must assess the need for maintaining the status quo. Its powers to do so derive from the same statutory sources that enable it to adopt the final rule." (Gov't Br. 53)

There is no question but that the order here involved represents an exercise of injunctive powers by an administrative agency. The order restrained the continuation of CATV activities "pending final disposition of this proceeding" (App. 170-71). The Commission itself described Midwest's original petition for temporary relief as one for an order to "cease and desist." (App. 147) The Government explicitly concedes the injunctive nature of the relief involved. "If any agency lacks the statutory authority to prescribe an interim stay pending an evidentiary hearing, the agency's only re-

course is to apply to a court of appeals for an injunction . . . ." (Gov't Br. 52)[51]

B. The Statutory Sources Relied Upon for the Injunctive Power Asserted.

Sections 4(i) and 303(r) of the Act are framed in language familiar in statutes conferring conventional powers upon an administrative agency.[52] The contention that they confer the extraordinary injunctive power here asserted is based upon authorities interpreting administrative powers in very different and completely inapposite circumstances. (Gov't Br. 45-47; Midwest Br. 45-46) The question here presented is whether Sections 4(i) and 303(r) authorize the injunctive power exercised. The general language of these sections requires that this question be tested in the light of the structure of the Act, and its legislative history rather than by sweeping cliches of statutory interpretation which literally assume the answer to the question presented.

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[51] Both petitioners concede that the injunctive procedure employed in FTC v. Dean Foods Co., 384 U.S. 597 (1966) was available to the Commission. Although petitioners presume the availability of injunctive relief, they attempt to defend the imposition of such a restraint by the Commission's own order on the ground stated by the Commission that the latter course was "preferable". (Gov't Br. 52-53; Midwest Br. 48).

[52] Section 4(i), 47 U.S.C. § 154(i) (1964), provides as follows:

> (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 303(r), 47 U.S.C. § 303(r) (1964), provides that the Commission shall –

> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

This task is made more difficult because the problem arises in the context of the Commission's asserted jurisdiction over CATV. As pointed out above (*supra*, pp. 32-34), the Communications Act is replete with explicit provisions which give meaning and limitation to the substantive and procedural powers granted to the Commission in areas it was expressly intended to regulate. For example, Section 316(a) of the Act, 47 U.S.C. § 316(a) (1964), expressly authorizes the Commission for stated reasons to "modify a station license or construction permit". This power to modify is available when the Commission has permitted a station to transmit signals in a manner that interferes with other legitimate uses of the radio spectrum. Nevertheless, Section 316(a) expressly requires that before the Commission modifies a license the licensee must be accorded a hearing if he so requests; and Section 316(b), 47 U.S.C. § 316(b) (1964), provides that at the hearing "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

It is therefore clear that the limiting impact of provisions of the Act relating to fields other than CATV would not permit the language of Sections 4(i) and 303(r) to operate in those fields with the same expansive and unlimited meaning claimed with respect to CATV. Since the Act does not deal with non-carrier wire communication, it does not contain similar sources of illumination and limitation. Paradoxically, it is this very lack upon which the Government relies to support the Commission's claim that its authority to regulate CATV "must encompass all that is necessary to prevent frustration of the Act's purposes." (Gov't Br. 45)

As we have earlier noted, this is but another way of claiming that not only has Congress directed the Commission to regulate CATV, it has directed it to do so pursuant to any procedures the Commission sees fit to adopt. Such a contention is so patently at odds with the Administrative Procedure Act and standards for the delegation of powers that it must be rejected out of hand. Rather, it is neces-

sary to look both to Sections 4(i) and 303(r) themselves and to a complex of relevant background in order to determine whether these provisions in fact confer the injunctive powers claimed.

This examination must be undertaken in the light of the clear record, documented in detail below, that Congress has been exceedingly chary in granting injunctive powers to administrative agencies and that the courts have been equally cautious in finding that such grants have been made. The law has been summarized as follows:

> Congress has granted to some agencies the power to issue orders effectively preserving the status quo, at least for a certain length of time, pending their own decision. Absent such statutory grant, however, it does not appear that a Federal administrative agency can issue such orders, regardless of the harm which may occur pending its decision or the possible inefficacy of orders it may enter after decision.

Jaffe, *Judicial Control of Administrative Action* 662 (1965).[53]

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[53] The reasons for this cautious approach has been summarized as follows in Gellhorn, Administrative Law Cases and Comments 774 (1960):

> . . .to argue that the legislature may constitutionally grant power to make provisional determinations summarily, is not to argue that the legislature should freely do so. Such a power involves obvious and grave dangers. Its misuse might destroy as fully as its proper use might protect. Before it is conferred, therefore, the legislature should in each particular case cautiously evaluate the need for so potent a weapon. Moreover, provisional orders pending the outcome of formal hearings should be allowed to have only a limited life span, lest delay in bringing cases on for hearing convert temporary decisions in effect into final ones. Further, the need for truly summary entry of provisional orders is infrequent. Rarely will a case arise in which time cannot be allowed for a hearing on the question whether good cause exists for making an order in advance of the hearing on the merits.

Aside from the fact that injunctive powers are not lightly conferred upon administrative agencies, the relevant language of Sections 4(i) and 303(r) evidence no intention to do so.[54] No such intention can be gleaned from language authorizing the Commission to "perform any and all acts" and "to issue such orders not inconsistent with this Act, as may be necessary in the execution of its functions" (Section 4(i) and "to prescribe such restrictions and conditions not inconsistent with law, as may be necessary to carry out the provisions of this Act" or of a treaty or international convention. (Section 303(r)). Indeed, this language justifies the conclusion that they are basically enabling provisions intended to implement specific provisions of the statute, not general grants of independent substantive authority which authorize the extraordinary action taken in this case. See *FCC v. American Broadcasting Co.*, 347 U.S. 284, 289-90 (1954). Their scope must be measured by reference to the express provisions and purposes contained in other sections of the Act. *Alabama Elec. Coop., Inc. v. SEC*, 353 F.2d 905 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 968 (1966). Thus, for example, these sections are validly employed to issue rules governing radio stations engaged in network broadcasting in view of the express authority conferred over such activities.[55] *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Similarly, the sections are properly employed to implement the express Congressional policy against monopoly enunciated in the Communications Act by limiting the number of stations under

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[54] The legislative history of Section 4(i) is set forth in Appendix B hereto; the legislative history of Section 303(r) is set forth in Appendix C hereto.

[55] Section 303(i) of the Act, 47 U.S.C. § 303(i) (1964), provides that the Commission shall "Have authority to make special regulations applicable to radio stations engaged in chain broadcasting."

common ownership or control. *Storer Broadcasting Co. v. United States*, 240 F.2d 55 (D.C. Cir. 1957).[56]

A basic and critical fallacy in petitioners' position is that Sections 4(i) and 303(r) contain explicit conditions which, in any event, operate to bar the power to issue the restraints involved herein. Thus, even if these sections were "construed" as grants of sweeping injunctive authority such authority in Section 4(i) is expressly limited to acts and orders "not inconsistent with this Act" and Section 303(r) is similarly limited to restrictions and conditions "not inconsistent with law." It is indisputable, however, that the restraints involved herein are squarely inconsistent with this Act and law since the limited restraining powers granted in the Act and by law are expressly conditioned on rigid observance of detailed procedural due process requirements.[57]

The legislative history of Section 4(i) (set forth in Appendix B) demonstrates no intent by Congress to make a broad grant of the extraordinary powers here involved. Section 4(i) was derived from a provision of the Interstate Commerce Act, 49 U.S.C. § 17(3) (1951), which was designed to permit the ICC to control "the order and regulation of proceedings before it."[58] It was desired that the new commission have similar powers, and Section 4(i) was described "as more general in terms and may be sufficient in scope to cover rules of practice and forms of pleading." (App. B). The legislative history makes it abundantly clear

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[56] See Section 313 of the Communications Act, 47 U.S.C. § 313 (1964).

[57] See, *e.g.*, Sections 204, 205(a), 214(c), 303(f) and (h), 312 and 316 of the Act.

[58] Subsection 4(i) of the Communications Act is contained in the Section entitled "Provisions Relating to the Commission" which sets forth and deals with such administrative matters as the number and salaries of the Commissioners; the location of the principal office; the employment of staff members; the fixing of payment of overtime to staff engineers; the making of expenditures for rent; expenses for

that this section was conceived as limited and narrow in scope, and not as a source of administrative injunctive power.

Section 303(r) was not part of the original Communications Act of 1934, but was enacted in 1937 as a consequence of unfortunate losses of life on the high seas in the *Morro Castle* and *Mohawk* disasters. The legislative history of the provision (set forth in Appendix C) shows that the only purpose of the provision was to extend the Commission's general regulatory and rule making powers to make it possible to give effect to "any international radio or wire communication convention" relating to safety at sea. Reliance on this provision to support sweeping and general injunctive powers by the Commission is wholly untenable.

C. The Significance of Section 312(b).[59]

The Communications Act of 1934 originally provided in Section 312 that the Commission was empowered to revoke a station license upon stated terms and conditions. As enacted, the provisions of Section 312 of the Act comprised the exclusive authority of the Commission to enforce administratively its decisions and orders with respect to the regulation of radio.[60] It soon became apparent, however, that this remedy was inappropriate and unduly harsh for a host of minor and relatively less serious offenses. Accord-

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supplies, books, periodicals, etc. The subsection immediately preceding 4(i) defines a quorum and provides: "The Commission shall have an official seal which shall be judicially noted." 47 U.S.C. § 154(h) (1964).

[59]The legislative history of Section 312(b), 47 U.S.C. § 312(b) (1964), is set forth in Appendix D hereto.

[60]Powers were also conferred upon the Commission by Sections 205(a) to issue cease and desist orders against common carriers with respect to charges, classifications, etc., determined to be in violation of the Act after "full opportunity for hearing". 47 U.S.C. § 205(a) (1964).

ingly, early in its history the Commission sought to supplement its authority so that it could deal appropriately with the regulatory problems presented. The history of the Commission's continuing attempts over the course of more than two decades to supplement and add to its enforcement authority is set forth in Appendix D hereto.

The Commission's efforts to obtain additional and more flexible enforcement authority was given impetus by the decision of this Court in *Regents v. Carroll*, 338 U.S. 586 (1950). Referring to a series of earlier cases before this tribunal, this Court concluded:

> These cases make clear that the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions.

338 U.S. at 598-99. The Court also noted that the Commission had been actively engaged before Congress in seeking authority for additional sanctions, but that the Commission's request for legislative action "did not go beyond asking for power to issue a cease and desist order against a licensee." 338 U.S. at 602.

Subsequent to the *Carroll* case, Congress in 1952 granted the Commission, in Section 312(b) of the Communications Act, the power to issue cease and desist orders. However, both the legislative history of that amendment to Section 312 and the language of the amendment make it clear that this new sanction is limited in scope and demonstrate the care with which Congress delegates injunctive powers to regulatory agencies. Consequently, the power to issue cease and desist orders may be exercised only for violations of the law, of Commission rules and regulations and license requirements. Moreover, the power may be exercised only in the case of past and not in the case of impending violations. Similarly, the procedural requisites have been carefully defined. The Commission must provide alleged violators with notice, specification of issues and a full hearing at which it must bear the burden of proof and of going for-

ward before it may enjoin them, i.e., before it may order them to cease and desist.

The legislative history also discloses that Congress has given detailed consideration to numerous proposals to expand the enforcement powers of the Commission, including suspension of licenses and institution of injunctive actions in the court pending the completion of show cause proceedings pursuant to Section 312(b). It is particularly significant that Congress has refrained from conferring authority, expressly requested by the Commission, to apply to the district courts for a temporary injunction pending the completion of show cause proceedings pursuant to Section 312(b) and involving alleged violations.[61] (App. D)

Petitioners contend that Section 312(b) is irrelevant, since it operates only as a sanction for past violations (Gov't Br. 51; Midwest Br. 50-51) and no violation is here alleged. The point is wide of the mark. In view of the express provisions of Section 312 and the legislative history the only valid conclusion is that the injunctive power expressly conferred in that section is the only one intended to be available to the Commission; and that additional injunctive power may not be inferred from the general language of Sections 4(i) and 303(r).

Nor is it relevant to this conclusion to describe the temporary injunction which the Commission issued in this case, somewhat delicately, as "merely an interim measure to assure that the public interest would not be frustrated pending a full hearing on what the public interest ultimately required." (Midwest Br. 51; Gov't Br. 51) When the Commission sought and failed to receive authority to obtain temporary injunctions from the courts pending the comple-

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[61] When he made the request on behalf of the Commission, its chairman stated that "The Federal Trade Commission is authorized in some situations to request the courts to enjoin or restrain an offending practice pending a final determination of the matter in an appropriate agency proceeding. In our view comparable legislation for the Federal Communications Commission would be in the public interest." (App. D 7-8).

tion of cease and desist proceedings against alleged violators, it was seeking the means to accomplish the same objective, i.e., it was also seeking "an interim measure to assure that the public interest would not be frustrated pending a full hearing."[62] However, since Sections 4(i) and 303(r) do not distinguish between those accused of violations and those conceded not to be in violation, the patent fallacy of petitioners' contention is that these provisions of the Act apply to both alike and the Commission's request for authority to obtain temporary injunctions from the courts was wholly unnecessary.

The Commission proceedings, before and after the decision of the Court in *Buckeye Cablevision, Inc. v. FCC*, No. 20,274 (D.C. Cir., June 30, 1967), is most revealing as to the extreme and wholly indefensible view taken by the Commission regarding the nature and extent of its authority to issue restraining orders of the type involved herein.[63] In the *Buckeye* case, the District of Columbia Circuit was presented with a permanent cease and desist order issued by the Commission after a hearing pursuant to Section 312(b) of the Communications Act against further *violation of the Commission's distant signal rules*. The power of the Commission to compel compliance with its rules was upheld by the Court in the *Buckeye* case.

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[62] In its request for such authority the Commission conceded that cease and desist sanctions are "severe", but that "the rights of the licensee are well protected by the hearing requirements of the Act." It asserted however, "in some situations a more expeditious means of dealing with an undesirable situation appears to us to be in the public interest . . . to request the court to restrain an offending practice pending a final determination of the matter in an appropriate agency proceeding." (App. D. 7)

[63] It will be noted that both petitioners relied principally and most heavily on the decision in *Buckeye Cablevision* in support of the requested writ of certiorari in this case.

After that Court decision, a new proceeding was initiated by the Commission – this time under Section 74.1109 of its rules – looking toward restraining the CATV system *from carrying Grade B signals authorized by the rules.* Pending an evidentiary hearing directed at this issue, the Commission imposed a "temporary" restraint upon Buckeye similar to that imposed upon the respondents in this case. *Buckeye Cablevision, Inc.*, 10 F.C.C.2d 745 (1967). If the Commission enjoys the unprecedented stay power which it claims, the earlier 312(b) proceeding was a pointless exercise and an imposition on the Court of Appeals. Incredibly, in the very same case the Commission, following court approval of its observance of the procedural due process requirements of Section 312 of the Act which were invoked for violations of its rules, promptly ignored such "niceties" and invoked its claimed authority under Section 74.1109 of its rules to restrain activities which were in compliance with all of its rules governing CATV operations.

D. The Congressional Attitude Toward Administrative Injunctive Power.[64]

The petitioners characterize the authority conferred upon the Commission by Sections 4(i) and 303(r) as "sweeping" or as a "broad grant" (Gov't Br. 45; Midwest Br. 37) and therefore adequate to confer the injunctive powers here exercised even in the absence of express language providing for such power. The attempt to find such authority in the general language of these provisions contravenes the underlying philosophy and consistent practice of Congress with respect to the grant of injunctive power to administrative agencies. Such relief is limited to instances where a violation is likely to cause insolvency or a substantial dissipation of the assets of a financial institution or is likely to otherwise seriously prejudice the interests of the saving account

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[64] A survey of the injunctive powers of 17 federal departments and agencies is set forth in Appendix E hereto.

holders. 12 U.S.C. §§ 1464(d), 1730, 1818 (Supp. II, 1965-66).[65]

To contend, as the petitioners do, that the injunctive power – particularly the power to issue *ex parte* temporary injunctions pending an administrative hearing – has been delegated to the Federal Communications Commission without express statutory authority, or any Congressional expression of intent to do so, or even consideration of the problem, is totally contrary to the consistent, deliberate and selective pattern of Congressional action in the area.

Congress has historically exercised the utmost care and selectivity in dispensing injunctive or cease and desist powers to the agencies. A survey of seventeen federal departments and regulatory agencies, as set forth in Appendix E, clearly demonstrates the care, precision and extreme caution with which Congress has made such powers available. In every case the grant and scope of such powers has been tailored to meet the particular needs of the agency involved and the areas of responsibility delegated to it. Both the criteria for the invocation of these powers and the detailed procedures to be employed are spelled out with particularity in all instances by Congress and *never* left to presumption or inference.

Only one departure has been found in the uniform Congressional insistence that temporary relief be obtained through the courts.[66] This is contained in the recently en-

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[65] Significantly, this exercise of emergency powers by a federal agency without prior hearing or resort to the court, is specifically authorized by Congress and is a modification of the more drastic previous Bank Board power to take over the actual management of the financial institution in similar instances. Act of June 13, 1933, ch. 64, § 5, 48 Stat. 132. The care with which Congress considered the Bank Board's and related agencies' recently granted power is illustrated by the legislative history. (App. E)

[66] The statutes authorizing such interim relief through the courts often impose prerequisites and standards upon the granting of such

acted Financial Institutions Supervisory Act of 1966 § 101(a), 12 U.S.C. § 1464(d) (Supp. II, 1965-66), which specifically authorizes the Federal Home Loan Bank Board, and related agencies, to issue a temporary injunctive order, without a hearing, pending evidentiary hearings.

E. Judicial Precedents.

The conclusion impelled by the Communications Act itself, its legislative history and the pattern of Congressional treatment of administrative power is fully supported by judicial precedent. In *Trans-Pacific Freight Conference of Japan v. Federal Maritime Board*, 302 F.2d 875 (D.C. Cir. 1962), the Federal Maritime Board issued an order prohibiting a voluntary association of steamship companies from assessing or collecting fines pending completion of a hearing as to an alleged violation of Section 22 of the Shipping Act, 46 U.S.C. § 821(1964). The Board argued that the temporary order was necessary to prevent irreparable injury. Even though the order was issued after oral argument, the Court of Appeals, finding no specific statutory authorization for such order, set it aside, declaring:

> The power which the Board now claims is in many ways a drastic one, and in fact more akin to judicial injunctive power than the power which Congress has given some agencies to issue cease and desist orders against conduct deemed in violation of law . . . But the Board is not a court, and cannot rely for its action on the powers of a court of equity. On the contrary, the law is settled that an administrative agency can exercise only those powers conferred on it by Congress. See, e.g., Civil Aeronautics Board v. Delta Airlines, 367 U.S. 316, 322, 81 S. Ct. 1611, 6

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injunctions by requiring a showing of irreparable injury and the posting of a security bond or by strictly limiting (e.g., to five days) the duration of the temporary order. NLRB; 29 U.S.C. § 107 (1964). Even absent such a special statutory prerequisite, the exercise of injunctive power by the Federal Courts is prescribed by the requirements of Fed. R. Civ. P. 65, 28 U.S.C.

> L.Ed. 2d 869 (1961); United States v. Seatrain Lines, 329 U.S. 424, 67 S. Ct. 435, 91 L. Ed. 396 (1947); Alaska Airlines v. Civil Aeronautics Board, 103 U.S. App. D.C. 225, 257 F.2d 229 (1958). We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency.

Id. at 880. See also *Standard Airlines, Inc. v. CAB*, 177 F.2d 18 (D.C. Cir. 1949), holding that, in the absence of express statutory authority, the general rule making powers conferred upon the CAB do not permit it to suspend a letter of registration granted an irregular air carrier pending a revocation hearing.

Petitioners attempt to distinguish these cases by reference to *R. A. Holman & Co., Inc. v. SEC*, 299 F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962).[67] In that case the Securities Exchange Commission, by interim order, suspended a broker's right to deal in exempt securities pending a hearing which involved allegations of the broker's prior violation of the Securities Act. Section 3(b) of the Securities Act, 15 U.S.C. § 77c(b) (1964), authorized the SEC to formulate the terms and conditions under which exempt offerings of small issues may be made. Under this provision, the SEC promulgated Regulation A, 17 C.F.R. § 230.251 *et seq.* (1966) which provided that public offerings of $300,000 or less were exempted from the principal registration requirements of the Federal Securi-

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[67] It is also suggested that the decision below conflicts with Amerada Petroleum Corp. v. FPC, 293 F.2d 572 (10th Cir. 1961), *cert. denied*, 368 U.S. 936 (1962). That case involved an interpretation of Section 4 of the Natural Gas Act, 15 U.S.C. § 717c (1964), which requires natural gas companies regulated under the Act to file notices of rate changes with the Federal Power Commission and authorizes that agency to suspend proposed rate changes for a five-month period. The case merely held that the system of rate regulation established by Section 4 operates to prevent a regulated natural gas company from making additional rate changes during a period when prior rate changes relating to the same gas are suspended.

ties laws. Regulation A incorporated SEC Rules 251 to 262. Rule 261, 17 C.F.R. § 230.261 (1966), authorized the Commission to suspend such an exemption temporarily any time it had reason to believe that sales literature contained untrue or misleading statements. Rule 252(e)(2), 17 C.F.R. § 230.252(e)(2)(1966), further provided that no exemption under Regulation A was to be available for the securities of any issuer if any underwriter of such securities was involved in a suspension under Rule 261.

The *Holman* case was not concerned with the power of the SEC to order a temporary suspension of a Regulation A exemption pursuant to Rule 261. The case was concerned with the much narrower question of the validity of Rule 252(e)(2), which removes the availability of Regulation A exemptions from securities whose underwriters are involved in suspension proceedings under Rule 261. As the Court observed:

> The Commission in Rule 252(e)(2) has provided that while a suspension hearing is in progress under Rule 261 . . , [the] 'usual' protective measures [for the securities-purchasing public], rather than the far less protective requirements applicable under Regulation A, shall govern issuance of securities by a party against whom suspension proceedings have been instituted.

299 F.2d at 132. Such action was not only within the SEC's power but was in fact incumbent upon it because of the express Congressional directive contained in Section 3(b) of the Securities Act requiring that, before the SEC exempts a class of securities, it make a finding that the protective provisions of the Act are "not necessary in the public interest and for the protection of investors."

Under the circumstances, the Court felt compelled to conclude that "the Securities and Exchange Commission's interest in protecting the public would seem to outweigh appellant's interest in being able to market small issues of securities without full registration for a temporary period while a hearing is in process." 299 F.2d at 132. More-

over, in upholding the Commission's power to suspend exemptions, the court relied in no small part upon Congress' implied endorsement of this exercise of SEC power. 299 F.2d at 133.

The distinctions between *Holman* and the instant case are manifest. Unlike the instant case, *Holman* involved a person charged with a violation of law. It also involved the suspension of a special privilege or exemption and agency action making the ordinary provisions of the statute applicable. This case involves the suspension of concededly lawful activities and whether the respondents should be treated – not in a preferred – but in a less advantageous manner than others similarly situated. Moreover, in *Holman* the continuation of the special privilege depended upon the ability of the administrative agency to maintain in effect findings which could not be so maintained in the circumstances. No such question is here involved. And in *Holman* there was a clear indication of Congressional approval. In this case the Congressional attitude is clearly adverse to the action taken.

Petitioners attempt two further distinctions of the judicial precedents. First , it is contended (Midwest Br. 47) that *Trans-Pacific* and *Standard Airlines* relate to the withdrawal of agency "authority previously granted . . . essential to the on-going business of private parties" and that "[t]he Commission never authorized the CATV systems." The short answer to this contention is that the Commission did undertake to authorize, govern and regulate the operation of CATV systems, including the responents, and this case involves a withdrawal of that authorization critical to their "on-going business". Second, it is argued that these cases are inapplicable because they deal with a "pending adjudication of an alleged violation." (Gov't Br. 51) We have previously pointed out that, whether or not a violation is alleged, a temporary injunction imposed by an agency pending a hearing to determine whether permanent restraints should be imposed is designed as "an interim measure to assure that the public interest would not be frustrated

pending a full hearing . . ." and that there is no policy reason for imputing to an agency greater authority over persons conceded not to be in violation of a pertinent statute or law than those suspected or accused of a violation.

F. The Relationship Between Rule Making and Adjudication.

Petitioners attempt to justify the restraints here imposed without an evidentiary hearing on somewhat similar grounds. Midwest contends that the Commission could have imposed "a blanket ban" on CATV expansion. (Midwest Br. 51-52) Taking only a slightly less extreme view of the Commission's powers, the Government suggests that the Commission could have prescribed "by general rule a suspension of system expansion pending a hearing in each and every case." (Gov't Br. 49) In support, petitioners rely on *SEC v. Chenery Corp.*, 332 U.S. 184, 202(1943).

Petitioners' argument is based on the cavalier assumption that the hypothesized rule – which in fact was not adopted – would meet all standards of valid agency action when judicially reviewed.[68] Certainly the assumption cannot be accepted in view of the fact that the Commission has not found compelling public interest reasons to impose a freeze upon

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[68] Section 10(e) of the Administrative Procedure Act, as amended, 5 U.S.C. § 706 (Supp. II, 1965-66), provides as follows:

> The reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings and conclusions found to be (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (d) without observance of procedure required by law; (e) unsupported by substantial evidence in any case subject to the requirements of sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute. . . .

all CATV; and had it done so, such general freeze might well have been challenged and overturned.[69]

What the Government does in this argument is to respond to a complaint of arbitrary action against the CATV respondents in this case by asserting that equally – or possibly even more – arbitrary action could have been imposed by general rule. But even if the Commission had the power to make an arbitrary rule of general application, that fact does not support the argument that it therefore has the power to take arbitrary action on a selected and individual basis against a single system.

Even if it is appropriate in this proceeding to pass upon the validity of a hypothetical rule imposing a general freeze, it is clear that such a rule would not have been valid if it had been issued by the Commission on the day it issued its order in this case.[70] The hypothetical rule would of necessity be required to be founded on a determination that a sufficient threat of general evil existed to warrant a prohibition against expansion by all CATV systems operating in the circumstances presented here. Such a determination could not have been made on the facts available. The whole thrust of the *Second Report and Order* is that it is in the public interest for CATV systems to offer to their subscribers stations whose Grade B signals are available at the location of the system. The Commission affirmatively determined that

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[69] In a closely analogous situation the Court of Appeals for the District of Columbia *en banc* affirmed the Commission's "refusal to institute a 'freeze' on construction permits for VHF stations to prevent competition with existing UHF stations." *Coastal Bend Television Co. v. FCC*, 234 F.2d 686, 690 (D.C. Cir. 1956).

[70] Even if the Commission had imposed a general "freeze", the freeze could not operate to deprive a person whose substantive rights would be permanently impaired of procedural due process i.e., consideration of his claims on the merits. See Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963).

it was desirable for such signals to be carried by CATV systems.[71] The hypothesized rule would therefore have not had the required factual bases.

This case must be decided in the light of what the Commission has done, not in the light of conjecture about what it might have done. In fact the Commission has adopted a rule which reserves to itself the power to impose upon *particular* CATV systems "additional or different requirements" than those contained in the rules generally, but which contains no standards whatsoever for the imposition of those requirements (Section 74.1109(a)) and leaves open to the Commission the procedures it will follow in imposing the "additional or different" requirements (Section 74.1109(f)). The Commission has, therefore, adopted a "rule" which in substance says certain CATV operations will be governed by such considerations as the Commission considers appropriate and by such procedures, including injunctions issued without hearing or argument, as it may choose to adopt in each particular case. The issue in this case is the validity of an injunction issued pursuant to a claim of unbridled authority in the guise of a "rule". This explicit rejection of the mandate of the Administrative Procedure Act and elementary principles of due process cannot be justified.

G. Judicial Standards for Injunctive Relief

The claimed authority to issue the order involved herein is fairly tested against judicial standards for injunctive relief. The order imposing the injunction (i.e., order for temporary relief) was issued on July 20, 1966. Its duration was fixed as "pending the outcome of this proceeding." (App. 174-75) The Commission admittedly "did not hold an evidentiary hearing" in connection with the issuance of the injunction (Midwest Br. 50), for the order was issued "pending an evi-

[71] In a succession of detailed findings and conclusions in the Second Report and Order, the Commission set out the affirmative public benefits flowing from CATV operations generally and Grade B carriage in particular. (App. 69, 71, 87, 105, 107, 112)

dentiary hearing." (Gov't Br. 52) Nor was oral argument permitted. The injunction has now been in effect for over a year and a half, and the Government has advised this Court that is it likely to remain in effect for approximately two years.

No federal court would have imposed a restraining order of such unusual duration without an evidentiary hearing and oral argument. Under the Federal Rules of Civil Procedure significant and short time limitations are imposed with respect to the comparatively extraordinary remedy of a temporary restraining order, those rules being designed to limit its impact to ten days except in unusual circumstances. Fed. R. Civ. P. 65(b), 28 U.S.C. The action taken by the Commission in this case is similar to a preliminary injunction the function of which is, "in general, to preserve the status quo pending a trial on the merits". 7 J. Moore, Federal Practice ¶ 65.04[3], p. 1641 (2d ed. 1966). However, an evidentiary hearing is required before a temporary injunction is issued. *Ibid.*

Moreover, the purpose of an injunction is to prevent irreparable injury and it is not issued on the basis of mere apprehension of injury. See *Continental Baking Co. v. Woodring*, 286 U.S. 352 (1932). The only injury here apprehended by the Commission was that, unless the injunction was issued, the respondents could wire up new subscribers and the Commission considers it to be impractical to withdraw service once established. (App. 116) The Commission in this connection advised the Ninth Circuit as follows:

> While such addition of new subscribers would not by itself cause any immediate public harm in terms of competitive effect upon the service of the local television stations, it would constitute exactly the sort of entrenchment which the Commission is trying to avoid. For it would mean additional disruption to the public in the event it is determined in the hearing to be held

that CATV systems in San Diego should not be permitted to bring in Los Angeles signals.[72]

However, if it is ultimately determined the Commission has jurisdiction over CATV and it ultimately determines to limit further expansion of CATV service by the respondents or to cut such service back, it may simply do so by order. No technical problem would be involved in effectuating such an order. The only problem involved would be possible dissatisfaction with the Commission's action by subscribers to the respondents systems who might then be deprived of access to Los Angeles signals, and the likelihood that such subscribers would voice their dissatisfaction. While such a situation might cause the Commission discomfort, it is hardly a ground for determining that there exists a danger of irreparable injury which justifies injunctive action.

Finally, the temporary injunction issued against the respondents has been in effect for more than a year and a half; an evidentiary hearing has since been held; and an initial decision has been reached in which it was concluded that respondents' operations have not "had any effect whatsoever on the service offered by the San Diego television stations"; and that " . . . the evidence on this record furnishes no basis for the imposition of any restrictions on the present or future operation of CATV systems in the San Diego market." *Supra*, p. 14. However, the Government has advised this Court that final Commission review of the initial decision is not likely to be completed until the end of this Term.

Thus, for the first time since this proceeding was initiated, the evidence has been heard and the trier of fact has concluded the injury feared by the Commission is not likely to occur. In the light of these events the petitioners' contention is not limited to sustaining the power of the Com-

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[72] Respondents' Motion for Reconsideration of Stay Order and Opposition to Motion To Stay at 14, Southwestern Cable Co. v. United States, 375 F.2d 118 (9th Cir. 1967).

mission to have issued the temporary injunction at the outset and without an evidentiary proceeding. The full scope of the petitioners' position is far more sweeping. It assumes, first, that the Commission may issue a preliminary injunction without an evidentiary proceeding, that the injunction may restrain services which are wholly legal under the Commission's rules and the local franchise; and that the injunction may deprive residents of San Diego of valuable news and other services authorized by a franchise from the City. It also assumes that the administrative injunction may be retained in effect for a period admittedly likely to approximate two years in the face of a subsequent judicial decision holding that it imposes substantial hardship on the respondents and a subsequent determination by the only trier of the evidence presented in the only evidentiary proceeding held that the purposes for which the injunction was initially issued will not be served by its continuance in effect.[73] Such patently arbitrary consequences demonstrate the reasons for the caution displayed by Congress in conferring any injunctive powers upon administrative agencies and for its insistence by explicit provisions upon the observance of procedural due process *prior* to the exercise of the power in the limited and selected situations where it is conferred.

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[73] In similar circumstances, it is evident that a court would dissolve a temporary injunction previously issued. See Two Guys From Harrison-Allentown v. McGinley, 366 U.S. 582 (1961); Guillory v. Adm'rs of Tulane Univ., 306 F.2d 489 (5th Cir. 1962).

CONCLUSION

For the foregoing reasons, it is urged that the judgment of the Court below be affirmed.

Respectfully submitted,

MORTON H. WILNER.
ARTHUR SCHEINER
HAROLD F. REIS

Landmark Building
1343 H Street, N.W.
Washington, D.C. 20005

Attorneys for Respondent Southwestern Cable Co.

Of Counsel:

WILNER, SCHEINER & GREELEY
Landmark Building
1343 H Street, N.W.
Washington, D.C. 20005

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APPENDIX A

Legislative History of Proposed Amendments to the Communications Act, Conferring Jurisdiction over CATV

I

On September 8, 1959, and after lengthy hearings during the 86th Congress, First Session, the Committee on Interstate and Foreign Commerce submitted Senate Report 923 accompanying and recommending passage of Senate Bill 2653, entitled "A bill to amend the Communications Act of 1934 to establish jurisdiction in the Federal Communications Commission over Community Antenna systems." The bill provided as follows:

> That section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by inserting at the end thereof the following: "(hh) 'Community antenna television system' means any facility performing the service of receiving and amplifying the signals transmitting programs broadcast by one or more television stations and redistributing such programs, by wire, to subscribing members of the public, but such term shall not include (1) any such facility which serves fewer than fifty subscribers, (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises, or (3) any such facility used only for the distribution, by wire, of programs for which a charge is imposed generally on all subscribers wherever located and which are not in the first instance broadcast for reception without charge by all members of the public within the direct range of television broadcast stations."
>
> Sec. 2. Section 3 (h) of the Communications Act of 1934 (47 U.S.C. 153) is amended to read as follows:

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna television system shall not, insofar as such person is so engaged, be deemed a common carrier."

Sec. 3. Title III of the Communications Act of 1934 (47 U.S.C. 301 and the following) is amended by inserting therein a new section 330 as follows, entitled:

"COMMUNITY ANTENNA TELEVISION SYSTEMS

"Sec. 330. (a) No person shall operate a community antenna television system except under and in accordance with this Act and with a license granted under the provisions of this Act: *Provided,* That a community antenna television system which is in operation on the date of the enactment of this section may continue to operate until the Commission issues a license therefor: *Provided further,* That any system continuing to operate in accordance with the foregoing shall, not later than one hundred and twenty days after such enactment, submit an application for a license containing all the information required by the Commission to be submitted with such application.

"(b) (1) The provisions of sections 303, 304, 307, 308, 310, 311, 312, 313, 315, and 316 relating to stations, radio stations, broadcasting stations, licenses therefor, licensees thereof, and station operators shall apply also to community antenna television systems, licenses therefor, licensees thereof, and operators thereof.

" (b) (2) The provisions of section 317 relating to matters broadcast by any radio station, and section 326 relating to radiocommunications shall be deemed to apply also to all matter distributed to

its subscribers by a community antenna television system.

" (b) (3) The provisions of section 319 relating to construction permits shall apply also to the construction and licensing of a community antenna television system: *Provided,* That the Commission, if it finds that the public interest, convenience and necessity would be served thereby, may waive the requirement of a permit for such construction.

" (c) The public interest, convenience, and necessity will be deemed to be served by the grant of an application for a license for the provision of existing program services by a community antenna television system which was in operation on the date of the enactment of this section subject to such conditions as the Commission may impose under subsection (d) hereof.

" (d) (1) Either prior to or within thirty days after the grant of an application for a license or a renewal thereof for a community antenna television system which was in operation on the date of the enactment of this section, the licensee of a television station assigned to a community in which such community antenna television system serves subscribers may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued operation of a television station which is providing the only available locally originated television broadcast program service.

" (d) (2) Such petition shall describe, in detail, the proposed operating conditions, and shall set forth, with particularity, the material effect of the proposed conditions on such continued television station operation. The community antenna television system shall be afforded an opportunity to respond to such petition within thirty days after public announcement of the filing thereof. After the expiration of such thirty-day period, the Commission shall determine whether the petition meets the foregoing requirements, and, if it does, shall deter-

mine whether, with due regard to service rendered by the community antenna television system and by petitioner's station, the public interest, convenience and necessity would be served by the adoption of the proposed or any other operating conditions. Public evidentiary hearings shall be held thereon if requested by either the petitioner or the community antenna television station within thirty days after public announcement of such determination, or if ordered by the Commission on its own motion prior to its determination.

" (d) (3) Any community antenna television system license issued under subsection (c) above shall be subject to conditions imposed in accordance with this subsection but any such license so issued shall not be stayed pending the Commission's final decision on any petition filed hereunder.

"(e) Findings by the Commission as to the effect upon the public interest, convenience, and necessity of the grant of an application or renewal or modification thereof for a community antenna television system which was not in operation on the date of the enactment of this section or for modification of a license for a community antenna television system which was in operation on the date of enactment of this section shall be made with due regard for the desirability of facilitating the continued operation of a television station which is providing the only available locally originating television broadcast program service. The provisions of section 309 shall apply to the issuance of licenses, modifications, and renewals thereof under this subsection.

" (f) (1) Upon application by the licensee of a television broadcast station (other than a station engaged solely in rebroadcasting) which is assigned to a community in which a community antenna television system provides television programs to local subscribers, the Commission may require that such community antenna service shall regularly redistrib-

ute programs broadcast by such local television broadcast station.

" (f) (2) The Commission may, by rule or order, prescribe such standards and conditions as it may find necessary to assure that the reception of the programs redistributed by the community antenna television system under subsection (1) shall be reasonably comparable in technical quality to the reception of programs of other television stations redistributed by the community antenna television system.

" (f) (3) The Commission also may, by rule or order, prescribe the period of time within which community antenna television systems shall complete preparations for and commence the redistribution of programs under subsections (1) and (2).

" (g) The Commission shall prescribe appropriate rules and regulations in order to avoid the duplication of programs broadcast or scheduled to be broadcast by a television station (other than a station engaged solely in rebroadcasting) which is assigned to a community in which a community antenna television system serves subscribers by such community antenna television system redistributing the signals of another television station. In promulgating such rules and regulations the Commission shall be guided by the standard set forth in subsection (e) of this section, requiring that due regard be given for the desirability of facilitating the continued operation of a television station which is providing the only available locally originating television broadcast program service."

The committee report explained the purpose of the bill was to place CATV under the jurisdiction of the FCC:

> This bill is designed to amend the Communications Act of 1934 so as to place community antenna television systems (CATV) under the jurisdiction of the Federal Communications Commission and to empower the Commission to issue requisite certificates of public interest, convenience, and necessity

> for the construction and operation of community antenna television systems. This bill declares CATV systems not to be common carriers and sets forth the sections of title III of the Communications Act affecting regular broadcasters that are to apply to the community antenna television systems.

S. Rep. No. 923, 86th Cong., 1st Sess. 3 (1959).

The report summarized the Commission's treatment of CATV since its inception and referred to its disclaimer of jurisdiction in *Frontier Broadcasting Co. v. Laramie Community TV Co.*, 16 P & F Radio Reg. 1005 (1958):

> The question of the FCC's jurisdiction over community antenna television systems and the type of regulation that should be imposed was raised many years ago. The FCC's files make it clear that this issue was presented to it as early as 1950 and that its staff recommended that it exert authority in this field. But, the Commission has long hesitated over the matter. In speeches by invidual commissioners and in testimony before your committee, doubt as to its power has been expressed but no official ruling was made until April 21, 1958, when the FCC decided a long-pending proceeding instituted by a group of small-town broadcasters who asked that the Commission regulate CATV systems as common carriers. (*See Frontier Broadcasting Company v. Collier*, 16 R.R. 1005 (April 1958.)) The Commission's final action in this matter made it perfectly clear that it did not intend to regulate CATV systems in any way whatsoever. However, on May 22, 1958, the FCC instituted an inquiry into the impact of community antenna television systems, television translators, television satellite stations, and television reflectors upon the orderly development of television broadcasting (docket No. 12443) and included as part of that proceeding the reconsideration of the above-mentioned *Frontier Broadcasting* case.

Id. at 5. After several amendments to the bill were offered, S. 2653 was debated on the Senate floor on May 17 and

18, 1960. Senator Pastore, chairman of the sponsoring committee, was the floor leader and explained that the bill was not designed to hurt CATV, but merely place it under regulatory control:

> This bill is not directed in any way toward injuring CATV as such. We seek merely to place CATV systems under regulation in order to protect their rights, and also to protect the rights of the only available broadcasting station, which may perish and go out of existence unless proper reforms are taken now of a very moderate nature.

106 Cong. Rec. 10417 (1960).

Senator Pastore was questioned at length on the purposes of the bill and explained it was a new delegation of authority of jurisdiction over CATV. In a brief colloquy, it was stated:

> Mr. CURTIS. First, I thank the distinguished Senator for his long efforts in a difficult area. I have given very limited study to S. 2653. It appears to me that the proposed legislation places the community antenna systems under the jurisdiction of the Federal Communications Commission. To that extent there is a delegation of authority to them. Does the bill directly prohibit or outlaw any act that the community antenna systems are doing now?
>
> Mr. PASTORE. I do not think so, aside from the fact that now they are at liberty to take a picture from a broadcasting station in Phoenix and show it in Yuma, for example. It may be earlier than the picture would be shown on the local broadcasting station in Yuma, and if the broadcasting station at Yuma made an application to the FCC, it could bring that to a stop. That would be a deprivation of some activity. That is about as far as it would go.
>
> Mr. CURTIS. The bill grants to the Commission the right to look into that situation?
>
> Mr. PASTORE. And to make rules and regulations.

Mr. CURTIS. To make rules and regulations.

But in the absence of action by the Commission, is there anything in the bill which prohibits what the community antenna systems can do?

Mr. PASTORE. I would not say so, unless the Senator sees something in the bill to the contrary.

Id. at 10425.

In answer to questions by Senator Kerr, an opponent of the bill and of the grant of jurisdiction to the FCC over CATV, Senator Pastore explained that the jurisdictional grant was necessary to develop an orderly system of TV:

> . . . [I]t is necessary to put these people under regulation, so that as new licenses are granted the Federal Communications Commission will have jurisdiction. The FCC then will be in a position to develop an orderly system of TV. However—and this must be borne in mind—insofar as harassment is concerned, or so far as a burden may be incurred, because of the duties that are imposed upon a CATV organization where there is no problem, I would assume the action of the Federal Communications Commission would be nothing more than perfunctory.

Id. at 10426. The Kerr-Pastore debate demonstrated that the issue before the Senate was whether the FCC was to gain jurisdiction over CATV through the passage of the amendment—jurisdiction which it admittedly lacked:

> Mr. KERR. Did it ever occur to the Senator from Rhode Island that there are hundreds and thousands of American Businesses in operation who are praying unto the Lord and their Government to protect them by keeping them free of regulation, rather then imposing it on them and then having them depend upon a legislative record made on the floor of the Senate which, if someone downtown whose identity we do not know, is controlled by it, will let them loose after they have paid a bunch of lawyers in Washington to come down to get them loose?

The Senator says he cannot write a bill to protect these people. Apparently the Senator does not know his own ability. . . .

. . . .

Mr. PASTORE. There was not one representative of a CATV who appeared before our committee who did not say that he wanted to be regulated. I call as my chief witness the Senator from Oklahoma [MR. MONRONEY], who is going to make the motion to recommit the bill. As a matter of fact, Senator MONRONEY introduced a bill himself to regulate the entire industry. However, that bill is only a shell. It does put them under regulation, but it does not regulate.

Mr. KERR. Next to not being under it, that is the best shape one can be in.

Ibid.

Senator Pastore urged that by conferring jurisdiction over CATV, the bill would actually provide protection to CATV systems against exorbitant charges by the broadcast station, should the stations prevail in pending copyright litigation. Senator Kerr countered that the FCC through its present jurisdiction over the broadcasters could protect CATV without extending its jurisdiction to CATV.

Mr. KERR. Did the Senator from Rhode Island say the Federal Communications Commission, which has control of the station whose signal is being picked up, could not control them without this act?

Mr. PASTORE. I did not say that.

Mr. KERR. That is what the Senator did say.

Mr. PASTORE. I said the CATV would not have any right to go before the FCC.

Mr. KERR. Who says they would not?

Mr. PASTORE. I say so.

Mr. KERR. Who prescribes that?

Mr. PASTORE. Because the Senator says they should be put under the CATV. That is just the point.

Mr. KERR. Cannot a person go into court and

ask for justice, without being set aside by the court?

Mr. PASTORE. The FCC is not a court. It is a regulatory body. We are trying to put the parties under this body with appropriate procedures.

Mr. KERR. The Senator wants to make them slaves, without provision for protection of their lives. How silly can one get?

Mr. PASTORE. I am not silly. I am talking about jurisdiction.

Mr. KERR. So am I.

Mr. PASTORE. I am talking about jurisdiction, and there is nothing silly in it.

Mr. KERR. The Federal Communications Commission does not have to be given regulatory control over any citizens to enable those citizens to go before that Federal Communications Commission and file a petition.

Mr. PASTORE. A petition to do what?

Mr. KERR. To enforce any right that an American citizen has with reference to that Commission's jurisdiction.

Mr. PASTORE. The Senator could not be more wrong than he is.

Id. at 10429-30. Senator Pastore, the floor manager, insisted that the bill was necessary to confer CATV jurisdiction upon the FCC, and that without it, the Commission was powerless to act.

Regarding the effects of the bill in conferring jurisdiction, Senator Monroney emphasized that it would provide unprecedented economic protection to broadcasters:

> The only test for the granting of a license for a television or a radio station, in the long history of the Federal Communications Act, has been, Is there a frequency available which will not interfere with the frequency assigned to someone else? A hundred television stations could be established if frequencies were available for them. If there is a radio station in Yuma, six stations could be put in if frequen-

cies could be found for them. But we have never contemplated granting economic protection to licensees until this bill was introduced. We are breaking entirely new ground, which will extend in the future to such a point that other people will want to install television in an area, and it will be necessary to provide economic protection for the local single station. I do not think such a policy has ever been established.

Id. at 10535. Senator Monroney compared the immunity from FCC regulation of reception and cable distribution by CATV to that enjoyed by the television networks:

> Mr. LONG of Louisiana. Does the bill violate the principle that the airways are free and are available to everyone?
>
> Mr. MONRONEY. I do not think it does. But it violates the principle of not having Federal regulation of cable transmission.
>
> Let me state the best illustration: All of us know that the mightiest force in television, which controls 90 percent of all television programs received by viewers in the United States, are the networks. They are not subject to regulation, and very few Members of Congress would want them to be regulated. Why? Because the concept of the Federal Communications Act is that the networks themselves are not putting anything on the air. They use cables to carry the signals to the local stations. So they are not regulated. So we do not regulate—and I do not think we should—the mighty giant of television which supplies the television diet of 50 million television sets by carrying the television program signals by cable to the viewers.
>
> But if the quite similar CATV systems are to be regulated by means of this bill, we shall be establishing a precedent; and in that event I do not see how we can properly regulate the smallest midget in the industry, but fail to give some consideration to regulating the mighty networks which are carrying signals by means of a similar system, and also without using the airways.

Id. at 10536. Senators opposing the amendment recognized that the bill was designed to provide economic protection for television.

> Mr. McCLELLAN. The meaning of the word "facilitate," as I understand it, is to make easy or less difficult; to free from difficulty or impediment. In other words, it is to facilitate the execution of a task; to lessen the labor of; to assist; aid.
>
> In other words, the station owner could petition the Federal Communications Commission to impose conditions that will facilitate, that will aid, that will remove any difficulty, that will remove encumbrance or hindrance to the continued operation of that station.
>
> Mr. MONRONEY. Which would mean limiting competition, which this bill is designed to do, from newly constructed CATV's.
>
> . . . .
>
> Mr. McCLELLAN. In other words, the rules the Commission promulgates must be promulgated to achieve that purpose. That is the proposed law we are considering. I am not saying it is not a good thing, but I think we ought to know what it does. This provision sets up a TV station in a position of preferred consideration, and in a position of preferred consideration in competition with another station.

Id. at 10537.

Senator Long registered concern over the economic advantage to broadcasters conferred by the bill.

> Mr. LONG of Louisiana. I am referring to page 4 of the bill, at line 21, where it provides:
>
> A television station * * * may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued operation of a television station which is providing the only available locally originated television broadcast program service.

> The thought that occurs to me is that it would seem to go far enough to say that the community antenna system should not impose any undue injury or hardship on the television station. However, to say that it could be required to operate in a manner to facilitate the continued operation of the competitor and system in his business, is too much to ask.
>
> . . . .
>
> Mr. LONG of Louisiana. As the law stands today there is nothing in the law by which the FCC can prevent one television station from driving another one out of business. I have seen that happen in my state, where a VHF station came into the community which had a UHF station, by providing a better signal and better programs.

Id. at 10541. Senator Hickenlooper questioned whether the proposed amendment conferring jurisdiction upon the FCC was constitutional.

> Mr. HICKENLOOPER. Mr. President, I merely wish to ask some questions of the Senator from Oklahoma or of another Member of the Senate.
>
> It seems to me that a rather complicated legal situation could arise in this instance. As I understand, a CATV station merely takes something out of the air, and does not put anything into the air.
>
> Mr. MONRONEY. That is correct.
>
> Mr. HICKENLOOPER. After it takes something out of the air—just like using the air we breathe—it then wires it, by means of a physical operation, into a house, where it is hooked up to a television set.
>
> Mr. MONRONEY. That is correct.
>
> Mr. HICKENLOOPER. What justification is there for having the Federal Government move into that regulatory field? Can it be called interstate commerce? If so, can the Federal Government then regulate my radio set in my house because I take the

signal out of the air by means of an aerial erected on top of my house?

Mr. MONRONEY. This presents a problem, because many think this is exclusively in the field of interstate commerce. Of course, the ether waves are interstate. But when the signal is taken out of the air and is transmitted to the Senator's house by cable, that is purely intrastate.

Id. at 10543. The issue to recommit the bill was plainly and openly acknowledged as an attempt to defeat it.

Mr. KERR. Mr. President, I rise in support of the motion to recommit the bill. I do it for the simple reason that I think it is an absolute necessity to protect the well-being and the opportunity for existence of over 760 small businesses. . . .

Id. at 10544.

The bill was recommitted by a vote of 39 to 38. *Id.* at 10547. A vote to reconsider failed 38 to 36. As a post mortem to the defeat of S. 2653, Senator Moss, a proponent of the bill, asked for further study by Congress as to whether, in view of the bill's failure to pass, appropriate legislation should be enacted to grant the FCC some jurisdiction over CATV in order to protect local television. *Id.* at 11462.

Throughout the lengthy debate, both proponents and opponents assumed that the legislation was necessary in order to confer jurisdiction upon the FCC over CATV. The legislation failed to pass.

II

In the 89th Congress, S. 3017 was introduced on March 4, 1966, 112 Cong. Rec. 4901 (1966). It was entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill provided no regulatory scheme or rules as did S. 2653, 86th Cong., 1st

Sess., but merely conferred jurisdiction over CATV upon the FCC. It also barred program origination by CATV, and relegated it to the role of receiving and distributing broadcast signals. This bill was submitted subsequent to the FCC's assumption of jurisdiction and was designed, in the words of its chairman as a confirmation of jurisdiction.

> The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate.
>
> . . . .
>
> —Of prime importance is the proposed new section 331(a)(1) of the act, which would expressly confer upon the Commission, in broad and comprehensive terms, authority to regulate community antenna systems in the public interest. This authority is to be exercised only to the extent necessary to carry out the purposes of the Communications Act, particularly the establishment and maintenance of broadcast services and the provision of multiple reception services. There is thus a congressional recognition of the public service rendered by the broadcast and CATV industries and a directive to promote the orderly growth of both industries.

Ibid.

Also, submitted along with the explanatory statement is the dissenting statement of Commissioner Loevinger who adhered to the previous FCC rulings that it had no jurisdiction.

SEPARATE STATEMENT OF COMMISSIONER LEE LOEVINGER REGARDING PROPOSED CATV LEGISLATION

I believe it is necessary for Congress to legislate on the subject of community antenna television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field, legislative authorization is, therefore, necessary.

. . . .

It would be desirable for Congress to establish more specific standards for administrative action than are contained in the proposed bill. But it is appropriate for Congress to delegate broad authority for the Commission to act under whatever standards Congress may see fit to establish.

Accordingly I join in recommending that Congress consider the proposed bill submitted herewith and enact legislation in such form as may best express the congressional view of the proper way to deal with the problems involving FCC jurisdiction to regulate CATV systems, the operation of CATV systems, the relations of CATV systems to conventional broadcasting stations, and the relation between Federal and State jurisdiction in this field.

Id. at 4902. The bill, S. 3017, contains the following language:

That section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof a new subsection to read as follows:

" (gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes

such signals by wire or cable to subscribing members of the public who pay for such service."

SEC. 2. The Communications Act of 1934 is further amended by adding a new section to read as follows, entitled:

"COMMUNITY ANTENNA SYSTEMS

"SEC. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority:

"(1) to issue orders, make rules and regulations and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast service and the provision of multiple reception services;

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

"(c) Nothing in this Act or any regulation promulgated hereunder shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State or Territory, the District of Columbia, the Commonwealth of Puerto Rico or any possession of the United States except to the extent of direct

conflict with the provisions of this Act or regulations promulgated hereunder."

III

Again in the 89th Congress a bill was introduced conferring jurisdiction over CATV. H.R. 13286, 89th Cong., 2d Sess. (1966). On June 17, 1966 the House Committee on Interstate and Foreign Commerce issued H.R. Rep. No. 1635, accompanying H.R. 13286, entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill, as amended, provides:

> That (a) section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new subsection:
>
> "(gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."
>
> (b) Subsection (h) of such section 3 is amended to read as follows:
>
> "(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate for foreign communications by wire or radio or in interstate or foreign transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna system shall not, insofar as the person is so engaged, be deemed a common carrier."
>
> SEC. 2 Part I of title III of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"COMMUNITY ANTENNA SYSTEMS

"SEC. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority –

"(1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

The Commission shall, in determining the application of any rule or regulation concerning the carriage of local broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

"(c) The Commission shall prescribe such rules and regulations and issue such orders as may be necessary to require the deletion by community antenna systems of signals carrying any professional

> football, baseball, basketball, or hockey contests if, after application by the appropriate league, the Commission finds that the failure to delete such signals would be contrary to the purposes for which the antitrust laws are made inapplicable to certain agreements under Public Law 87-331.
>
> "(d) Nothing in this Act or any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated under it."

H.R. Rep. No. 1635, 89th Cong., 2d Sess. 1-2 (1966).

In the purposes of the legislation, the Committee was cautious not to challenge the FCC's already assumed jurisdiction.

> The principal purposes of the legislation are to –
>
> (1) delineate the scope of the authority of the Federal Communications Commission to regulate CATV systems. . . .

Id. at 2. The Committee pointed out that although the Federal Communications Commission had asserted its jurisdiction over CATV, the Committee would not state a position, except to say that the Congress should confer this jurisdiction.

> In reporting the instant legislation, the committee does not either agree or disagree with the above conclusions. Test cases are pending at present in the courts. Therefore, the question of whether or not and to what extent the Commission has authority under present law to regulate CATV systems is for the courts to decide in such cases.
>
> It is the considered judgment of the committee, however, that in order properly to regulate broadcasting and communications in the United States the

> Commission should have the broad powers which the instant legislation would confer upon the Commission to regulate CATV systems.

Id. at 9.

The Commission, in its explanatory note attached to the Committee report, candidly admitted it wished the Congress to confirm jurisdiction which it had assumed.

> The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate.

Id. at 16. Commissioner Loevinger issued a separate statement explaining that although he favored the proposed legislation, he believed it necessary to confer jurisdiction upon the FCC.

> I believe it is necessary for Congress to legislate on the subject of Community Antenna Television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under the present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field legislative authorization is, therefore, necessary.

Id. at 20.

The Department of Justice, in response to a request for its views, was careful not to state an opinion as to whether the FCC had jurisdiction over CATV.

> The principal purpose of the bill is to clarify and confirm the Commission's jurisdiction over community antenna systems in order that the Commission shall have clear authority to integrate com-

munity antenna service into the national broadcast structure in such a way as to promote maximum service to everyone, including both those persons who are dependent upon off-the-air service and those who may receive cable service.

Id. at 21.

The minority report of the Committee did not hesitate to state its position that the Commission lacked jurisdiction over CATV and that the Commission had unlawfully usurped this jurisdiction.

> H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; it would thwart the judicial processes which are presently considering the issues involved; it would create an entirely new concept of regulation at the Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a person could or could not receive over his television or radio set—to name a few of the flaws.

Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the limited frequencies available in the spectrum. Regulation was for the sole purpose of properly policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

The history of the Communications Act of 1927 and the amendments thereto of 1934 reflects clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this attempt by the passage of a bill denying them the power to enter the field of economic control.

H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

A CATV system is a wired communications system and does not use the spectrum or public domain for broadcasting purposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisidction of CATV systems as such.

There are three methods by which programs can be received by a CATV system to be transmitted over its wires:

1. The pure off-the-air system. This is the case where a high antenna is employed to catch any broadcast signals that happen to come its way.

2. The microwave-fed system. This is the system where the original broadcast is rebroadcast through the spectrum, one or several times, until it reaches its desired destination. (The FCC has jurisdiction over the microwave facility because it is a rebroadcast into the spectrum, but not over the reception facility.)

3. The coaxial cable. This is a system where a coaxial cable is employed from the broadcasting station to the CATV system. If the coaxial cable does not cross a State line, the Federal Communications Commission does not have jurisdiction. If the coaxial cable does cross a State line, the jurisdiction of the FCC attaches under its jurisdiction over an interstate common carrier by wire. However, in this case the jurisdiction of the the Commission does not extend to a determination of what can or cannot be carried over the wire.

The present bill is designed to give the Federal Communications Commission absolute control over reception by all three methods. The main objective of the Federal Communications Commission is to gain control over the off-the-air (subpar. 1 above) and the coaxial cable (subpar. 3 above), for by this method the Commission can gain direct control over reception of television signals insofar as all CATV systems are concerned. It has had an indirect, limit-

ed power over CATV systems using microwave. The operator of a microwave facility must get a license from the Federal Communications Commission because he is transmitting radio signals. The Commission has taken the position that it can issue a license with restrictions and conditions as to what the microwave operator can transmit, even though section 326 of the Communications Act prohibits censorship.

If the Congress passes H.R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals—jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite transmittals, as well as local broadcasting stations and network broadcasts. Freedom requires that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

. . . .

It is to be noted that the Federal Communications Commission, although previously denying jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it

wants badly—an entirely new concept in governmental regulation.

The Congress of the United States should not abdicate its legislative powers and delegate to a commission the power to write substantive law by rules and regulations promulgated by an appointed body.

If the Federal Government is to enter a new field of regulation, the manner and extent to which this will be undertaken should be definitely and explicitly spelled out by the duly elected representatives of the people of this country in the Congress of the United States and not by a board, a bureau, or a commission wholly and completely insulated from the electorate.

Id. at 23-25.

The minority views, in respect to the powers of the Commission and its lack of jurisdiction over CATV, were not disputed by the majority, which merely urged passage of the legislation. A second minority report also strenuously objected to the jurisdictional grab by the FCC.

Community antenna television systems have been around since 1950, and until 1965 the Federal Communications Commission very clearly indicated that it did not pretend to have jurisdiction over the transmission of broadcast signals by cable. In fact it specifically denied having such jurisdiction. Suddenly, however, the Commission did a complete turnabout and argued that it had always possessed authority to regulate cable television as an extension of broadcasting and its recognized interstate character. By a 5 to 2 decision the Commission determined that the Communications Act of 1934 meant something else and something more than it clearly is. When we consider the fact that the makeup of this Federal agency changes rapidly, such action can lead to dangerous consequences.

Apparently uncertain of its ground, the Commission prepared and suggested a most peculair piece

of legislation which is H.R. 13286. Even a casual reading of this bill will indicate that it makes no attempt to determine a broad policy under which the CATV industry should develop in conjunction with the broadcasting industry. Instead it merely grants broad authority, throwing the whole problem to the Federal Communications Commission and hoping for the best.

Most of the 30 amendments which were offered by members of the committee during the deliberations on this bill were intended to show the will of Congress and to provide reasonably clear guidelines. They were offered in an attempt to make this bill at least reasonably consistent with past principles for the regulation of industry. They were defeated.

The result of passing H.R. 13286 would be to create havoc within an industry of great importance to the public because the policies adopted by the Commission for its regulation today could well be reversed or radically changed a month or a year hence. There are no general principles to which the industry can point or by which the Congress may oversee the activities of its creature, the Federal Communications Commission.

In the case of broadcasting facilities the Federal Communications Commission must allocate a frequency and issue a license therefor. In the case of community antenna systems there is no provision for licensing, but the bill does grant authority to issue permits for construction. This of course means that construction authority can be denied to any applicant. Under the terms of this bill construction permits would be within the complete discretion of the Commission. In our opinion this grants to the Federal Communications Commission a completely unacceptable and probably unconstitutional power over this industry.

> There are presently pending lawsuits which will determine whether or not the Federal Communications Commission was right when it first denied having jurisdiction over CATV or whether it was right later when it reversed itself. Also pending are lawsuits to determine the applicability of the copyright laws to material carried by CATV systems. The determination of these matters requires no legislation and little purpose is served in passing such legislation at this time, particularly since it does not purport to lay down realistic policies and guidelines within which regulation of the CATV industry can logically proceed.

Id. at 26-27. The bill failed to reach the floor for vote.

APPENDIX B

Legislative History of Section 4(i) of the Communications Act of 1934

Section 4(i) first appeared in H. R. 8301, 73d Cong., 2d Sess. (1934), was carried into S. 2910, and S. 3285, 73d Cong., 2d Sess. (1934), without change, and was finally enacted as section 4(i) of the Communications Act of 1934, 48 Stat. 1066, 47 U.S.C. § 154(i) (1960).

In the Senate Interstate Commerce Committee report on S. 3285, S. Rep. No. 781, 73d Cong., 2d Sess. (1934), there is no specific discussion of section 4(i). And as to the entirety of section 4, the Committee's only comment is:

> Section 4: Provides for a bipartisan commission of five members with terms of 6 years at an annual salary of $10,000.

Id. at 3. The House Committee's comments on S. 3285 were equally abbreviated. Like the Senate Committee's report, there is no specific comment on section 4(i) in the report of the House Interstate and Foreign Commerce Committee on S. 3285, H. Rep. No. 1850, 73d Cong., 2d Sess. (1934). As to the entirety of section 4, however, the following comment appeared:

> Section 4 provides for a bi-partisan commission of 7 members, holding office for 7-year terms at a salary of $10,000.[1] *It also provides for the appointment of personnel and contains other provisions usual in the case of the creation of a new administrative body.*

Id. at 5 (emphasis added).

At the same time, however, the Senate Interstate Commerce Committee stated:

---

[1] The 7-member, 7-year-term provisions substituted by the House for the 5-member, 6-year-term provisions proposed by the Senate were accepted by the Conference Committee.

> This bill is so written as to enact the powers which the Interstate Commerce Commission and the Radio Commission now exercise over communications. . . .
>
> In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communications companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective.

S. Rep. No. 781, *supra*, at 3.

Section 4(i) was evidently derived from Section 17 of the Interstate Commerce Act, 24 Stat. 385, as amended, 49 U.S.C. § 17(3) (1964), and at the hearings on the proposed Communications Act, Interstate Commerce Commissioner McManamy testified:

> Presumably paragraph (i) of the section [4] is intended to cover the same ground as the following provision in section 17(1) of the Interstate Commerce Act:
>
> "The [Interstate Commerce] Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the Commission, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States."
>
> This is the specific provision under which this [Interstate Commerce] Commission prescribes its rules of practice and the forms of pleadings before it. Paragraph (i) is more general in terms and may be sufficiently broad in scope to cover rules of practice and forms of pleading. Those matters are of such importance, however, that the question of the [Fed-

> eral Communications] Commission's authority should not be left in doubt.

Hearings on H. R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 90 (1934); Hearings on S. 2910 Before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 202 (1934).

The only legislative reference to section 17 of the Interstate Commerce Act (as section 14 of S. 1532, 49th Cong., 2d Sess. (1886) is found in the remarks of Senator Cullum, the sponsor of S. 1532:

> Section [17] relates to the conduct of the work of the Commission.

17 Cong. Rec. 3474 (1886).

APPENDIX C

Legislative History of Section 303(r) of the Communications Act of 1934, as amended

Following the unfortunate loss of life as a result of fire at sea on the steamship *Morro Castle* (September 8, 1934), and the further loss of life as a consequence of the sinking of the steamship *Mohawk* (January 24, 1935), S. Res. 63 was introduced in the United States Senate on January 28, 1935, 79 Cong. Rec. 1039 (1935). That resolution, among other things, requested the Senate Committee on Commerce to initiate inquiries into the circumstances of those two disasters, as well as the broader question of safety of life at sea, and to make recommendations to Congress on what measures might be taken to better insure the safety of life and property at sea in the future. In the words of the Senate Commerce Committee:

> The *Morro Castle* and the *Mohawk* disasters moved the Senate of the United States to adopt a resolution requesting the Committee on Commerce of the Senate or a subcommittee thereof to conduct a study of the causes of these disasters, to make studies which might throw light on the question of safety of life at sea, and to make recommendations to the Congress for greater security of persons and property at sea. The Committee on Commerce authorized its chairman to organize a Subcommittee of the Department of Commerce and Merchant Marine, and this subcommittee authorized the chairman, Senator Copeland, to solicit the aid of technical experts in the work directed by this Senate resolution. A technical committee of such experts was appointed. This general technical committee gave special consideration to the problem of radio, to the part radio plays in the navigation and operation of ships, and to its contribution to safety. As a result of this study of the problem the bill, which the Commerce Committee now reports, was prepared and introduced by Senator Copeland.

S. Rep. No. 2060, 74th Cong., 2d Sess. 2-3 (1936).

The bill referred to was S. 4619, an amended version of S. 3954, introduced by Senator Copeland on January 11, 1937, the purpose of which was "to modernize our law with respect to radio installations and radio operations aboard ships to the end that safety at sea may be further assured." *Id.* at 1.

The FCC's view of the proposed legislation is found in the testimony of Lt. Commander E. M. Webster before the Senate subcommittee considering the measure:

> The primary purpose of the recommended legislation is to replace and modernize the Ship Act [of 1910, as amended in 1912] dealing with the equipping of ships with radio apparatus and the manning by operators for safety purposes. In view of the close relationship between the Ship Act and the Communications Act, 1934, it is believed both logical and necessary to combine the two in enacting new legislation to replace the Ship Act. Therefore it will be noted that the suggested legislation is in the form of amendments to the Communications Act; otherwise, it would necessitate a repetition of many provisions of the Communications Act in order to form a complete related whole.
>
> Both the Ship Act, enacted 25 years ago, and the Communications Act of 1934 are now inadequate as they do not provide by statute for the full utilization of radio as a major safety factor at sea . . . .

Hearings on S. 3954 Before a Subcommittee of the Senate Committee on Commerce, 74th Cong., 2d Sess. 11 (1936). See also, statement of Irvin Stewart, *id.* at 8-9.

The main provisions of the bill were four: (1) A substantial broadening of the category of ships required to have radio communications equipment operated by qualified operators, as well as radio direction-finder apparatus; (2) Detailed technical requirements for radio installations on board ships, which requirements were in conformity with those found in the 1929 International Convention on Safety of

Life at Sea and the International Telecommunication Convention; (3) A revision of earlier requirements regarding the number, qualifications, functions and licensing of operators of radio installations on board ships; (4) A requirement that every motorized lifeboat required by treaty or statute be fitted with radio equipment. *Id.* at 3-4. "Other provisions of the bill," stated the Committee, "are either redrafts of existing law or involve in the main non-controversial matters." *Id.* at 4.

Among those "other provisions" of S. 4619, Section 4 of the 1934 Communications Act was proposed to be amended to add a new subsection (o):

> For the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life and property, the Commission shall investigate and study all phases of the problem and the best methods of obtaining the cooperation and coordination of these systems. *The Commission shall, by proper rules and regulations or by conditions incorporated in the authorization or license, prescribe the conditions and procedure to be observed, in harmony with the law, in communications involving safety and property.* [Emphasis added.]

S. 4619 was passed by the Senate and sent to the House, but was unable to be acted on by that body before the end of that session of the 74th Congress.

During the latter part of 1936, the International Convention on Safety of Life at Sea, London, 1929, was ratified by the United States. And in the following year, on January 11, 1937, a bill essentially the same as the earlier S. 4619 was introduced in the first session of the 75th Congress by Senator Copeland as S. 595. Its counterpart in the House was H. R. 4191.

The earlier proposed addition of a subsection (o) to section 4 of the Communications Act was preserved in both the House and Senate bills. In addition, both bills proposed a new section 360(a) to the Communications Act:

> In addition to any other provision of law, the Commission shall make such rules and regulations, determinations, or findings as may appear to be necessary to give effect to the radio and communications provisions of the safety convention.

This provision was part of a proposed new Part II of Title III of the 1934 Communications Act, entitled "Radio Equipment and Radio Operators on Board Ship," the stated purpose for which was ". . . to promote safety of life and property at sea through the use of radio." S. 595, 75th Cong., 1st Sess. §351 (1937).

During the hearings before both the Senate and House committees considering the measure, the Federal Communications Commission recommended, among other things, that the second sentence of section 4(o) and the entirety of section 360(a) of the bill be deleted, and a new section 303(r) be substituted, as follows:

> (r) [Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity require shall—] Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Hearings on H. R. 4191 Before the House Committee on Merchant Marine and Fisheries, 75th Cong., 1st Sess. 2-3 (1937); Hearings on S. 595 Before a Subcommittee of the Senate Committee on Commerce, 75th Cong., 1st Sess. 12 (1937).

The reasons for the suggested change were contained in a Statement by Anning S. Prall, then Chairman of the FCC:

> In view of the fact that many of the situations which will confront the Commission as a result of

> the ratification of the safety convention and the passage of this bill will be new, that changes in the rules and regulations may be desirable from time to time, and that new international radio agreements doubtless, will be effected in the future, it is important that the Commission should have authority generally to prescribe such rules and regulations and to impose such restrictions and conditions as may be necessary to administer the act as amended and existing or future international agreements concerned with radio and wire communication. *Such general authority would permit the Commission to meet promptly and effectively situations which arise under the safety convention, provisions of this bill, and international agreements entered into in the future.*

Ibid. (emphasis added).

The bill, as reported out of the Senate Commerce Committee, S. Rep. No. 196, 75th Cong., 1st Sess. (1937), and as enacted, 50 Stat. 191, adopted the FCC's suggestion.

APPENDIX D

Legislative History of Section 312 of the Communications Act of 1934, As Amended

As demonstrated in the narrative below, Section 312 of the Communications Act has been the repository of the Commission's authority to administratively enforce the provisions of the Act and the Commission's Rules. As originally enacted, Section 312 granted the Commission power to modify and to revoke licenses. In 1952, the authority to issue cease and desist orders was granted, and in 1960—the last legislative broadening of powers under Section 312—the authority to impose forfeitures was conferred.

At the time of its creation, the Commission's sole administrative penalty for violation of the Communications Act or the Commission's regulations was the authority to revoke licenses. Cf., e.g., S. Rep. No. 49, 81st Cong., 1st Sess. 4 (1949). As originally enacted, Section 312 of the Act, entitled "Revocation of Licenses", consisted of two subsections. The second subsection granted to the Commission authority to modify broadcast station licenses in certain circumstances. More importantly, however, subsection (a) accorded the Commission authority to revoke station licenses

> . . . for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States . . . .

Certain procedural prerequisites to the Commission's exercising its power of revocation were included in subsection (a).

In subsequent years, a number of legislative efforts were made to broaden the Commission's power to enforce both the Act and the Commission's regulations. For it was felt that, particularly in the case of lesser offenses by licensees, there was a "need for some means of enforcement of the act and for the prevention of violations of the act or to [sic] rules short of the extreme penalties of revocation or criminal prosecution which [the Commission] is naturally loathe to invoke." Hearings on S. 1333 Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess. 51 (1947) (Statement of Charles R. Denny, then Chairman, Federal Communications Commission).

Accordingly, S. 1333, 80th Cong., 1st Sess., introduced in 1947, proposed a new cease and desist power as subsection (b) to Section 312 of the Act:

> Where a station licensee (1) has failed to operate substantially as set forth in the license, or (2) has failed to observe any of the restrictions and conditions of this Act or of a treaty ratified by the United States, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act, the Commission may institute a proceeding by serving upon the licensee an order to show cause why it should not cease and desist from such action. Said order shall contain a statement of the particulars and matters with respect to which the Commission is inquiring and shall call upon the licensee to appear before the Commission at a time and place therein stated, but in no event less than 30 days after receipt of such notice, and give evidence upon the matter specified in such order. If, after hearing, or a waiver thereof by the licensee, the Commission determines that a cease and desist order should issue, it shall make a report in writing stating the findings of the Commission and the grounds and reasons therefor and shall cause the same to be served on said licensee, together with such order.

Favorably reporting on that provision of S. 1333, the Senate committee agreed with the Commission "that some method of procedure short of revocation should be provided for minor or less serious violations. It is therefore provided [in S. 1333] that the Commission may issue cease-and-desist orders for such less serious violations." S. Rep. No. 1567, 80th Cong., 2d Sess. 11 (1948). The House failed to act on S. 1333 prior to the end of the 80th Congress.

During the same year, 1948, the Senate Committee on Interstate and Foreign Commerce appointed a subcommittee "to study certain communications problems", including the organization and administrative problems of the FCC, cease and desist orders, radio and wire communications frauds, clear channels and superpower in AM broadcasting, frequency allocation in FM broadcasting, censorship of radio programs, and common carriers. S. Rep. No. 49, 81st Cong., 1st Sess. 1 (1949). The subcommittee's report was submitted to the full committee on January 24, 1949, and approved and adopted by the committee on February 9, 1949. *Ibid.*

As to Section 312 of the Communications Act, the report concluded that changes should be made, since the only administrative penalty available for violations of the Act or the Commission's Rules was revocation, and that penalty was unlikely to be used for minor offenses. As stated in the report:

> Your subcommittee recommends, therefore, the enactment of a section which would authorize the issuance of cease and desist orders for less serious violations. The revocation penalty would remain in effect for two classes of violations: (1) for cases in which the Commission learns of facts or conditions after the granting of a license which would have warranted it to refuse a license originally had it known those facts; (2) for violation of a cease-and-desist order. Both the revocation and cease-and-desist procedure would remain, of course, subject to judicial appeal.

> Such a provision was a part of the White bill (sec. 12 of S. 1333, 80th Cong.) and had the general support of the Commission, the industry, and members of the bar who practice before the Commission. The cease-and-desist order procedure has had considerable trial in other administrative agencies and has proved generally satisfactory.

Id. at 4-5.

Subsequently, on May 31, 1949, S. 1973, 81st Cong., 1st Sess., was introduced by Senator McFarland. Section 11 of the bill proposed a new Section 312(b) to the Communications Act, identical in form to that proposed in S. 1333 in the 80th Congress, *supra.* During the Senate hearings on the bill, the Commission, through its Acting Chairman, Rosel H. Hyde, endorsed the measure, but urged that the applicability of the cease and desist provision not be restricted to station licensees:

> The Commission believes that it may be advisable to extend the power to issue cease and desist orders where any person, and not merely station licensees, has violated the Communications Act, a Treaty, or the Commission's Rules. Such an amendment would make the cease and desist order provisions applicable to persons who are radio station operators who may violate the Act or Commission's Rules as well as to station licensees.

Hearings on S. 1973 Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess. 20 (1949). The bill reported out of the Senate committee adopted the suggestion, making the cease and desist provision applicable to "any person" rather than "a station licensee". S. 1973 was passed by the Senate on August 9, 1949. The measure was not acted on by the House.

However, H.R. 4251, also introduced in the 81st Congress, which proposed an amended Section 4(g) of the Communications Act, was considered by the Senate Committee

on Interstate and Foreign Commerce. As reported out by the Committee, the bill was amended to include all of the provisions of the earlier S. 1973. S. Rep. No. 2119, 81st Cong., 2d Sess. (1950). While the measure was passed in its amended form by the Senate on July 26, 1950, no further action was taken prior to the end of the 81st Congress.

In the first session of the 82nd Congress, S. 658, virtually identical to S. 1973 and H.R. 4251 in the 81st Congress, was introduced on January 23, 1951. Two days later, the bill was reported out of committee unchanged, S. Rep. No. 44, 82d Cong., 1st Sess. (1951), and was referred to the House.

In the House hearings on S. 658, Wayne Coy, then Chairman of the Commission, endorsed the bill's grant of cease and desist powers, but urged the grant of additional administrative sanctions—the authority to suspend licenses and to impose fines. In Chairman Coy's words:

> S. 658 proposes to give the Commission authority to issue cease and desist orders. We think this will be useful in certain types of cases. However, our experience in recent years leads us to believe that cease and desist orders alone will not adequately take care of the problem. Therefore, we have recommended . . . that in addition to the authority to reject a license or to issue cease and desist orders, the Commission should be authorized to suspend licenses for periods up to 90 days or to impose reasonable fines for violation of the Act or the Commission's Rules. . . . Authorizing the Commission to utilize such lesser sanctions is all the more important in the light of the great increase in radio use by persons who are not primarily engaged in radio as a means of livelihood like the taxicab owners and industrial users and the other people who have been more and more using radio as an aid to their primary activity. . . . By authorizing the Commission to impose fines for violation of its rules and regulations we hope to command greater respect for these rules and regulations.

Hearings on S. 658 Before the House Committee on Interstate and Foreign Commerce, 82d Cong., 1st Sess. 71 (1951). Section 10 of the bill, as reported by the House Committee, modified somewhat the grounds for revocation contained in the Senate version. In addition, adopting Chairman Coy's suggestions, the House version of the bill included in the proposed new Section 312 of the Act both suspension and forfeiture provisions. H.R. Rep. No. 1750, 82d Cong., 2d Sess. 12-14 (1952).

As reported out of the conference committee, however, and as enacted, 66 Stat. 716 (1952), S. 658 conferred neither suspension nor forfeiture powers on the Commission. As explained in the conference report:

> The section [amended Section 312 of the Act] as it is retained in the conference substitute is the same as the House amendment insofar as the grounds for revocation are concerned, but the provisions which would have authorized the Commission to suspend licenses or to impose forfeitures have been eliminated.
>
> It is believed that the authority to issue cease and desist orders will give the Commission a means by which it can secure compliance with the law and regulations by licensees. As an alternative to revoking the license in case of failure to obey a cease and desist order, the Commission will be able to invoke the aid of the courts, under section 401(b) of the act, to secure compliance. The courts will be able to enforce compliance through their power to punish for contempt.

H.R. Rep. No. 2426, 82d Cong., 2d Sess. 20 (1952).

Following the 1952 amendments to Section 312 of the Act, efforts were continued to be made to further broaden the Commissions's enforcement powers. In 1959, for example, S. 1737, 86th Cong., 1st Sess., sought to empower the Commission to levy forfeitures for violations of the Act or the Commission's regulations. No final action was taken on the measure, however.

Subsequently, in 1960, during the second session of the 86th Congress, a series of bills were introduced, proposing additional enforcement powers for the Commission under Section 312 of the Act, including forfeitures and the suspension of licenses. E.g., S. 1898, H.R. 7017, H.R. 10241, H.R. 10242, H.R. 11341, H.R. 11397, H.R. 11398, 86th Cong., 2d Sess. (1960).

During the House consideration of the various measures, Frederick W. Ford, then Chairman of the Commission, endorsed and urged adoption of the provisions for both forfeiture and suspension powers. Hearings on S. 1898 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. 65-67 (1960). In addition, however, Chairman Ford urged adoption of a new section to be added to Title V of the Communications Act, to authorize the Commission to issue temporary restraining orders in "appropriate cases":

> Section 312 of the Communications Act of 1934, as amended, provides for the revocation of a station license upon making certain findings after notice and opportunity for hearing. That section also provides that the Commission may, after notice and opportunity for hearing, enter a cease-and-desist order against any person who (1) has failed to operate substantially as set forth in a license or (2) has violated or failed to observe any of the provisions of this act, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this act or by a treaty ratified by the United States.
>
> These sanctions are severe and the rights of the licensee are well protected by the hearing requirements of the act. In most cases this is as it should be; however, in some situations a more expeditious means of dealing with an undesirable situation appears to us to be in the public interest. The Federal Trade Commission is authorized in some situations to request the courts to enjoin or restrain an offending practice pending a final determination of the matter in an appropriate agency proceeding. In our

view, comparable legislation for the Federal Communications Commission would be in the public interest. Accordingly, we recommend that a new section be added to title V of the Communications Act to read as follows:

"Whenever the Commission has reason to believe—

"(*a*) that any person or station licensee is engaged in, or is about to engage in, any willful violation of this Act or failure to observe any of the provisions of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, or for repeated failure to operate substantially as set forth in the licensee's instrument of authorization, and

"(*b*) that the enjoining thereof pending the invoking of the provisions of section 312 of this Act and until a show-cause order shall have been dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final, would be in the public interest, convenience, or necessity, the Commission may, by any of the attorneys designated by it for such purpose, bring suit in a district court of the United States or in the United States court of any territory to enjoin such offense or violation. Upon proper showing a temporary restraining order and preliminary injunction shall be granted without bond. Any such suit shall be brought in the district in which such person or licensee resides or transacts business."

This new section would enable the Commission to move more expeditiously in critical cases without depriving our licensees of due process.

Id. at 64-65.

While the House report referred to Chairman Ford's testimony, H.R. Rep. No. 1800, 86th Cong., 2d Sess. 16, n.3, [illegible], n.2 (1960), the bill reported out of committee contained only the initially proposed suspension and forfeiture provisions.

Following Senate consideration of S. 1898, Hearings on S. 1898 Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. (1960), the House provision for suspension of licenses was deleted, and only the forfeiture provision was retained. S. Rep. No. 1857, 86th Cong., 2d Sess. 7-8 (1960). The committee report explained:

> At present the FCC's authority to enforce the Communications Act and other related statutes and its rules and regulations are four in number . . . The four sanctions authorized under existing statute are as follows:
>
> 1. Revocation of license, section 312 of the Communications Act;
>
> 2. Issuance of cease and desist orders, section 312 of the act; enforcement of cease and desist orders either through revocation or through court order (Sec. 401 (b) of the act) for violation of which contempt penalties may be imposed by a court;
>
> 3. The criminal penalties of fine or imprisonment, or both, for willfully and knowingly doing anything prohibited by the act, or for willfully or knowingly failing to do a thing required by the act (sec. 501 of the act); and
>
> 4. The criminal penalty of a fine of not more than $500 for each and every day during which any person willfully or knowingly violates any rule, regulation, restriction or condition made or imposed by the Commission under the act (sec. 502 of the act).
>
> . . . .
>
> We feel that the sanctions now available in the Communications Act, plus the forfeiture penalties herein being provided, give the Commission adequate tools to take effective action against offending licensees without the adverse results that flow from a temporary suspension of a broadcast facility. . . . .

Id. at 7.

The bill was enacted in the form reported out of the Senate committee. 74 Stat. 889, 47 U.S.C. §503(b) (1960).

APPENDIX E

Injunctive and Cease and Desist Powers Available to Federal Administrative Agencies

The Attachment to this Appendix represents a survey of 19 Federal departments and regulatory agencies. It fully demonstrates the care and precision with which Congress has defined the injunctive and cease and desist powers which may be exercised by the agencies themselves and injunctive powers which are exercised by the courts upon petition of the agencies.

The survey illustrates the great diversity of granted powers. The powers are clearly responsive in each case to the particular needs of the agency involved and the areas of responsibility delegated to it. In no case is a general injunctive or cease and desist power granted to an agency or department without specific statutory guidelines regarding the criteria and procedures for its exercise. In all instances, both the criteria for the invocation of these powers and the detailed procedures in connection therewith are specified by Congress, rather than being left to regulations by the particular department or agency.

Statutory Criteria for Invocation of Powers[1]

The statutes spell out with great specificity the circumstances or criteria under which the agencies concerned may exercise these powers. In some cases, the exercise of cease and desist power, or the right to petition a court for an injunction, is limited to cases of statutory violation.[2] More typically, however, cease and desist powers may be exer-

[1] Citations to statutes referred to herein are in abbreviated form. Complete citations appear in the Attachment hereto.

[2] Department of Agriculture, 7 U.S.C. §1599; Department of Health, Education and Welfare, 21 U.S.C. §§332, 344, 381; Federal Trade Commission, 15 U.S.C. §§21, 45(b), 53, 68e(b), 69g(b), 70f, 1195(a); Interstate Commerce Commission, 49 U.S.C. §§5(7), 5(8), 1011(d), 1017(b); National Labor Relations Board, 29 U.S.C. §§160(1), 178, 217.

cised where a violation of a statute, or a regulation or order of the agency, has occurred.[3] In some instances, Congress has also authorized the exercise of this power where a license issued by the agency is not being conformed with,[4] or where other conditions, imposed by the agency in writing, are violated.[5]

While the statutes usually require a violation of a specific prohibition imposed by statute or a regulation, Congress has in a few instances permitted the invocation of these powers for violations defined with lesser specificity, such as "unfair competition" in the grant of powers to the Federal Trade Commission,[6] and "unsafe and unsound practices" in the grant of powers to the Federal Home Loan Bank Board[7] and related agencies.[8]

The statutes also spell out whether the exercise of the cease and desist authority or the petitioning for judicial in-

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[3] Atomic Energy Commission, 42 U.S.C. §2280; Civil Aeronautics Board, 49 U.S.C. §§1482(c), 1487; Federal Communications Commission, 47 U.S.C. §312(b); Department of Agriculture, 7 U.S.C. §1599; Federal Home Loan Bank Board, 12 U.S.C. §1464(d); Federal Deposit Insurance Corporation, Board of Governors of the Federal Reserve System, and Comptroller of the Currency, 12 U.S.C. §1818; Federal Power Commission, 16 U.S.C. §825m; Securities Exchange Commission, 15 U.S.C. §80a-41; Small Business Administration, 15 U.S.C. §687a(b).

[4] Federal Communications Commission, 47 U.S.C. §312(b).

[5] Federal Home Loan Bank Board, 12 U.S.C. §1464(d); Federal Deposit Insurance Corporation, Board of Governors of the Federal Reserve System, and Comptroller of the Currency, 12 U.S.C. §1818; Federal Savings and Loan Insurance Corporation, 12 U.S.C. §1730.

[6] 15 U.S.C. §45(b).

[7] 12 U.S.C. §1464(d).

[8] Federal Deposit Insurance Corporation, Board of Governors of the Federal Reserve System, and Comptroller of the Currency, 12 U.S.C. §1818; Federal Savings and Loan Insurance Corporation, 12 U.S.C. §1730.

junctive relief may be undertaken with regard to past violations only,[9] or whether it may be utilized to prevent prospective violations as well.[10]

Significantly, therefore, while a number of agencies are permitted to exercise such powers when a person "is about to engage" in an act violative of a statute, regulation or order,[11] the applicability of the cease and desist powers granted to the FCC are specifically restricted to *past* violations.[12] The power is further limited to cases where there is a violation of the terms of the license involved, the criminal law, or any rule or regulation of the Commission authorized by the Communications Act or United States treaty; it does not extend to any other circumstance.

Statutory Procedure in the Exercise of the Power

The statutes display both a great specificity and a wide diversity in the procedures to be utilized by the agencies

[9] Civil Aeronautics Board, 49 U.S.C. §1482; Department of Agriculture, 7 U.S.C. §§193, 194; Federal Communications Commission, 47 U.S.C. §312; Federal Maritime Commission, 46 U.S.C. §816; Department of Health, Education and Welfare, 21 U.S.C. §332; Interstate Commerce Commission, 49 U.S.C. §§5(7), 5(8), 16(12), 1011(d); National Labor Relations Board, 29 U.S.C. §§ 160(j), 217; Securities Exchange Commission, 15 U.S.C. §80a-35; Small Business Administration, 15 U.S.C. §687a; Tennessee Valley Authority, 16 U.S.C. §831y-1.

[10] Atomic Energy Commission, 42 U.S.C. §2280; Commission on Civil Rights, 42 U.S.C. §1971(c); Federal Home Loan Bank Board, 12 U.S.C. §1464(d); Federal Savings and Loan Insurance Corporation, 12 U.S.C. §1730; Federal Deposit Insurance Corporation, Board of Governors of the Federal Reserve System, and Comptroller of the Currency, 12 U.S.C. §1818; Federal Power Commission, 16 U.S.C. §825m; Federal Trade Commission, 15 U.S.C. §53; National Labor Relations Board, 29 U.S.C. §178; Securities Exchange Commission, 15 U.S.C. §77t(b); Small Business Administration, 15 U.S.C. §687c.

[11] *Ibid.*

[12] 47 U.S.C. §312(b).

in the exercise of cease and desist powers or request for injunctive relief. Several statutory enactments require that whenever there is a violation calling for injunctive-type orders, the agency concerned may not act directly, but rather must bring action in a United States court for the issuance of such orders.[13] Other agencies are required to report violations to the President,[14] or are authorized to request the Attorney General to institute court action on their behalf. in order to enforce compliance with the statute or agency regulation.[15]

Several agencies are granted the power to issue cease and desist orders on their own behalf.[16] And in several of these cases, the statute further provides that such cease and de-

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[13]Small Business Administration, 15 U.S.C. §687c(a); Federal Power Commission, 16 U.S.C. §825m; Federal Trade Commission, 15 U.S.C. §§53, 68e(b), 69g(b), 70f(a), 1195(a); Department of Health, Education and Welfare, 21 U.S.C. §332; Interstate Commerce Commission, 49 U.S.C. §§5(8), 1017(b); National Labor Relations Board, 29 U.S.C. §§160(j), 217; Securities Exchange Commission, 15 U.S.C. §§80a-35, 80a-41, 77t(b), 78u(e), 79r(f), 80b-9(e); Tennessee Valley Authority, 16 U.S.C. §831y-1.

[14]National Labor Relations Board, 29 U.S.C. §178.

[15]Atomic Energy Commission, 42 U.S.C. §2280; Commission on Civil Rights, 42 U.S.C. §1971(c).

[16]Federal Trade Commission, 15 U.S.C. §45(b); Civil Aeronautics Board, 49 U.S.C. §1381; Federal Trade Commission, 15 U.S.C. §21; Department of Agriculture, 7 U.S.C. §§ 193, 194, 1599; Federal Communications Commission, 47 U.S.C. §312; Federal Home Loan Bank Board, 12 U.S.C. §1464(d); Federal Savings and Loan Insurance Corporation, 12 U.S.C. §1730; Federal Deposit Insurance Corporation, Board of Governors of the Federal Reserve System, and Comptroller of the Currency, 12 U.S.C. §1818; Federal Maritime Commission, 46 U.S.C. §816; Federal Trade Commission, 15 U.S.C. §§21, 45(b); Interstate Commerce Commission, 15 U.S.C. §21; National Labor Relations Board, 29 U.S.C. §160(c); Small Business Administration, 15 U.S.C. §687a.

sist orders may be enforced through agency application to the courts for injunctive relief.[17]

In all cases where a Federal agency is granted cease and desist powers, however, such powers may be exercised only after proper notice and the right to a hearing are accorded the parties concerned. The FCC statute,[18] for example, specifically requires that a notice of at least thirty (30) days be given prior to the hearing. And only when safety of life or property is involved may shorter notice be given.

Some of the statutes which grant agencies cease and desist powers recognize that emergency action may be required in particular cases. In all such instances, however, the statutes specifically provide that pending a cease and desist proceeding by the agency, action may also be instituted by the agency in the appropriate Federal Court for a temporary injunction.[19]

Moreover, the statutes authorizing interim relief through the courts often prescribe prerequisites to the granting of such injunctions—a showing of irreparable injury, the filing of a security bond, and a strict limitation (e.g., to five (5) days) on the duration of the temporary order.[20] The rights of the restrained party are further protected by a statutory requirement that appeals from such judicial orders should be given precedence over all other cases.[21] Even absent special statutory prerequisites to the issuance of preliminary

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[17]Civil Aeronautics Board, 49 U.S.C. §1487; Interstate Commerce Commission, 49 U.S.C. §16(12); Small Business Administration, 15 U.S.C. §687c.

[18]47 U.S.C. §§312(b), (c).

[19]Department of Agriculture, 7 U.S.C. §193; Federal Trade Commission, 15 U.S.C. §§53, 1195(a); National Labor Relations Board, 29 U.S.C. §160(1).

[20]National Labor Relations Board, 29 U.S.C. §107.

[21]*Id.* §110.

injunctions and temporary restraining orders, the exercise of these powers by Federal courts is limited by the requirements of Rule 65 of the Federal Rules of Civil Procedure, 28 U.S.C., which imposes both notice and time limitations.

There is only *one exception* to the foregoing requirement that cease and desist powers not be exercised without a hearing and that interim injunctive relief be obtained from the courts. Provision for an emergency cease and desist order by the Federal Home Loan Bank Board is made by the Financial Institutions Supervisory Act of 1966 in the specific instance where the violation is likely to cause insolvency or a substantial dissipation of the assets of the association, or is likely otherwise seriously to prejudice the interest of the savings account holders.[22] Significantly, however, this exercise of emergency powers by a Federal agency without prior hearing or resort to the courts is *specifically provided for* by Congress, and is a modification of the earlier more drastic Bank Board power—to take over actual management of a financial institution through the appointment of a supervisory representative.[23]

The care with which these extraordinary powers are defined is illustrated by the legislative history of the new Federal Home Loan Board law.[24] In support of the proposed measure, the Senate Report cited a letter from the Secretary of the Treasury and other officials to the effect that:

> Existing remedies have proven inadequate. On the one hand they may be too severe for many situations, such as taking custody of an institution or terminating its insured status. On the other they may be so time consuming and cumbersome that substantial injury occurs to the institution before remedial action is effected.

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[22] 12 U.S.C. §1464(d).

[23] Act of June 13, 1933, ch. 64, §5, 48 Stat. 132. (See Attachment, paragraphs 5.b.; 5.c.)

[24] *Supra* note 22.

S. Rep. No. 1482, 89th Cong., 2d Sess. 5 (1966). Furthermore, the Committee's summary of the proposed new enactment clearly noted, with regard to the issuance of temporary cease and desist orders, that in advance of an administrative hearing,

> The Board would have discretionary authority to issue such orders whenever it determined that the continuation of such violations or practices is likely to insolvency or substantial dissipation of assets or earnings of the association, or is likely to otherwise seriously prejudice the interests of savings account holders. The change in the language of the original bill from "could cause" to "is likely to cause" insolvency is designed to reflect the committee's intent that the possibility of such consequences be a reasonable one and not merely a theoretical one, but it is not intended to amount to a required showing of definite probability.
>
> . . . .
>
> However, an association could, within 10 days after service of a temporary cease-and-desist order, apply to the proper U.S. district court for a stay of the order pending the completion of the administrative proceedings pursuant to the notice of charges against the association . . . . In ruling upon any such application, the district courts will, of course, be guided by the traditional tests employed in actions for temporary or preliminary relief from administrative agency action when the public interest is involved.

Id. at 11.

In summary, the attached survey establishes that in no instance is an agency permitted to exercise cease and desist powers unless a person has violated, or is about to violate, an existing statute, rule, regulation or other pre-existing requirement. Some agencies are not granted cease and desist powers, but must rely upon the courts for injunctive relief. Others are granted the power to issue cease and desist or-

ders, but only after according affected persons notice and a hearing. For interim relief, pending a hearing, agencies must resort to the court and petition for temporary injunctive relief. Only the Federal Home Loan Bank Board and related agencies have been authorized, under specified circumstances, to issue a temporary cease and desist order without notice and hearing. And in those instances, the statute specifically provides for the stay of such orders by a Federal District Court on application filed by the affected party within ten (10) days.

APPENDIX E
ATTACHMENT

Survey of Injunctive and Cease and Desist Powers Available to Federal Agencies

Statutory Procedure	Statutory Criteria for Invocation of Power
1. *Atomic Energy Commission*	
Whenever in the judgment of the Commission a violation has occurred or is about to occur, the Attorney General applies to appropriate court for injunction or order enforcing compliance with the law. Upon showing by the Commission of violation or impending violation a permanent or temporary injunction, restraining order or any other order may be granted.[1]	Any person has engaged in or is about to engage in any acts which constitute or will constitute a violation of provisions of Chapter 23 or regulation or order issued thereunder. (Chapter 23 deals with the development, use and control of atomic energy.)

[1] Atomic Energy Act of 1954 §232, 42 U.S.C. §2280 (1964), 68 Stat. 959.

Statutory Procedure	Statutory Criteria for Invocation of Power
2. *Civil Aeronautics Board*	
a. The board may, on its own initiative or on complaint of air carrier, foreign air carrier, or ticket agent, if it considers such action in the public interest, investigate and determine whether problem exists. If the Board finds, after notice and hearing, that a violation exists, it shall order violators to cease and desist.[2]	Air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof.
b. If the Administrator or Board finds non-compliance, after notice and hearing, Administrator or the Board shall issue an appropriate order to compel such person to comply therewith.[3]	Any person has failed to comply with any provision of this chapter (Federal Aviation Program) or any requirement established pursuant thereto.
c. The Administrator or Board applies to United States District Court for enforcement and District Court shall have jurisdiction to enforce by a writ of injunction.[4]	Any person violates provision of chapter or any rule, regulation, requirement or order thereunder.

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[2]Federal Aviation Act of 1958 §411, 49 U.S.C. §1381 (1964), 72 Stat. 769.

[3]*Id.* §1002(c), 49 U.S.C. §1482(c) (1964), 72 Stat. 788.

[4]*Id.* §1007, 49 U.S.C. §1487 (1964), 72 Stat. 796.

Statutory Procedure	Statutory Criteria for Invocation of Power
3. *Commission on Civil Rights*	
The Attorney General institutes a civil action or other proceeding including an application for permanent or temporary injunction, restraining order, or other order.[5]	Any person has engaged in or there is reasonable grounds to believe that he is about to engage in any act which would deprive other persons of a voting right or privilege.
4. *Department of Agriculture*	
a. Secretary shall cause complaint to be served on packer, etc. and designate hearing. Upon finding of violation, the Secretary shall issue cease and desist order which shall be final unless packer within 30 days appeals to Court of Appeals. Court may, on application of Secretary, issue temporary injunction against packer or it may set Secretary's order aside. Court may hold additional hearing. If Court affirms the Secretary, the decree shall operate as an injunction.[6]	Any packer of livestock, meats, meat food products, live poultry, or dealers or handlers thereof engaged in unfair acts, giving unreasonable advantages, creating monopoly, restraining commerce, etc.

[5]Civil Rights Act of 1960, §601(b), as amended, 42 U.S.C. §1971(c) (Supp. II, 1965-66), 79 Stat. 445.

[6]Packers and Stockyards Act, 1921 §§203, 204, 7 U.S.C. §§193, 194 (1964), 42 Stat. 161-62.

Statutory Procedure	Statutory Criteria for Invocation of Power
b. Same as in 4.a., *supra*.[7]	Any person has violated or is violating any provisions of this Act (re labeling requirements, false advertisements, adulteration, etc.) or the rules and regulations promulgated thereunder.
5. *Federal Home Loan Bank Board*	
a. If, in the opinion of the Federal Home Loan Bank Board, there is a violation, the Board may issue and serve a notice of charges and of date at which a hearing will held to determine whether cease and desist should issue. If association does not appear at hearing with representative, it shall be deemed to have consented to issuance. In the event of such consent, or upon a finding that violation has been established, the Board may serve an order to cease and desist. Such order may require association to cease and desist from such and to take affirmative action to correct conditions. Order remains effective until modified, terminated, etc. by Board or reviewing court.	Any association is or has violated, or is about to violate a law, rule, regulation, charter, or other condition imposed in writing by the Board re granting of any application; or is engaging, has engaged or is about to engage in an unsafe or unsound practice.

[7] Federal Seed Act §§409, 410, 7 U.S.C. §§1599, 1600 (1964), 53 Stat. 1287.

Statutory Procedure	Statutory Criteria for Invocation of Power
When Board determines violation is likely to cause insolvency or substantial dissipation of assets of the association or is likely to seriously prejudice the interests of its savings account holders, Board may issue a temporary order requiring the association to cease and desist. Such order is effective immediately upon service and remains effective pending completion of administrative proceedings and until Board dismisses or issues cease and desist. Temporary orders could be stayed by a District Court on application filed within 10 days. Permanent orders issued after hearing, may be appealed to Circuit Court.[8]	
b. The Board shall by formal resolution state any alleged violation of law or regulations, and give written notice to the association concerned. Such association shall have 20 days to correct alleged violations. If the association does not comply within such period, the Board shall give such as-	Violation of any provision of the Section (re organization, incorporation, examination, operation and regulation of Federal Savings and Loan Associations), or rules and regulations made thereunder.

[8] Financial Institutions Supervisory Act of 1966 §101(a), 12 U.S.C. §1464(d) (Supp. II, 1965-66), 80 Stat. 1028.

Statutory Procedure	Statutory Criteria for Invocation of Power
sociation 20 days written notice of a time and place of a hearing. Such hearing will be in the Federal judicial district of the association and conducted by a hearing examiner as provided by the APA. After the notice of violation, either the Board or the association affected may, within 30 days after service of said notice, apply to the U. S. District Court for a declaratory judgment and an injunction or other relief with respect to such controversy.[9]	
c. If, in the opinion of the Board, a violation exists and the Board determines that an emergency exists requiring immediate action, the Board is authorized to appoint *ex parte* and without notice a Supervisory Representative to take charge of said association. Unless sooner removed by the Board such Representative shall hold office until a conservator or receiver appointed by the Board after notice, takes charge of the associa-	Insolvency of association, violation of law or of a regulation under the section, concealment of books, records or assets of association from examiner or agency of FHLBB, or unsafe or unsound operation.

[9] Act of June 13, 1933, ch. 64, §5, 48 Stat. 132. The provision cited was included in the predecessor to §101(a) of the Financial Institution Supervisory Act of 1966, *supra* note 8.

Statutory Procedure	Statutory Criteria for Invocation of Power
tion, or for six months, or until 30 days after the termination of the administrative hearing as herein provided, or until 60 days after the final termination of any litigation affecting such temporary appointment, whichever is longest. The Board shall have the power to appoint a conservator or receiver pursuant to a formal resolution of the Board stating the grounds thereof and after notice thereof is given to association stating the grounds thereof and an opportunity for an administrative hearing therein is afforded to association.[10]	
6. *Federal Savings & Loan Insurance Corporation*	
Same as in 5.a., *supra*.[11]	Same type of violation as in 5. a., *supra*, regarding insured institutions.

[10] *Ibid.*

[11] Financial Institutions Supervisory Act of 1966 §102(a), 12 U.S.C. §1730 (Supp. II, 1965-66), 80 Stat. 1036.

Statutory Procedure	Statutory Criteria for Invocation of Power
7. *Federal Deposit Insurance Corporation, Board of Governors of the Federal Reserve System, and Comptroller of the Currency.*	
Same procedure by the appropriate Federal banking agency (Comptroller of the Currency in the case of a national banking association, or a district bank; the Board of Governors of the Federal Reserve System in the case of a state member insured bank and the FDIC in the case of a state non-member insured bank) as in 5.a., *supra*.[12]	Same violations as in 5.a., *supra*, regarding insured institutions.
8. *Federal Maritime Commission*	
Whenever the Commission finds that any such rate is demanded it may alter the same to the extent necessary, and make an order that the carrier shall discontinue demanding any such discriminatory rates. Orders shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted on Commission's own motion.[13]	A common carrier by water in foreign commerce has demanded, charged or collected a rate, fare or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the U. S. as compared with their foreign competitors.

[12] *Id.* §§202, 204, 12 U.S.C. §1818 (Supp. II, 1965-66), 80 Stat. 1046, 1054.

[13] The Shipping Act of 1916 §§17, 23, 46 U.S.C. §§816, 822 (1964), 39 Stat. 734, 736.

Statutory Procedure	Statutory Criteria for Invocation of Power
9. *Federal Power Commission*	
Commission may bring an action in proper United States District Court to enjoin. Upon proper showing, a permanent or temporary injunction or decree or restraining order is issued by the Court.[14]	Whenever it appears to Commission that any person is engaged or about to engage in acts violating provisions of Chapter 12 (Federal Power regulations) or any rule, regulation or order thereunder.
10. *Federal Trade Commission*	
a. Whenever the agency vested with jursidiction (ICC, FCC CAB, Federal Reserve Board or FTC) has reason to believe any person violates or has violated the law it shall serve on such person and the Attorney General a complaint and notice of hearing. If upon hearing, the agency finds a violation it shall issue cease and desist orders. Any affected person may obtain review in United States Court of Appeals.[15]	A person is or has violated Sections 13, 14, 18 and 19 of Title 15 (Discrimination in price, service, facilities, rebates, discounts, advertising service charges; undercutting in certain localities; sales contingent on agreement not to use goods of competitors; acquisition of competing companies; interlocking directorates).
b. When Commission has reason to believe that unfair or deceptive practices are engaged in, it shall issue and serve upon violators complaint stating charges and a notice of	A person is using or has used unfair methods of competition or deceptive practices in commerce (in violation of Sections tions 41-46 and 47-58 of Title 15).

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[14]Public Utility Act of 1935 §314, 16 U.S.C. §825m (1964), 49 Stat. 861.

[15]Antitrust Act, 1914 §11, 15 U.S.C. §21(b)-(c) (1964), 38 Stat. 734.

Statutory Procedure	Statutory Criteria for Invocation of Power
hearing. Person has right to appear and show cause why cease and desist order should not be entered. If upon hearing, Commission determines that the practices violate the law, it shall report so in writing and shall issue a cease and desist order. Affected persons may obtain review by U. S. Court of Appeals.[16]	
c. When Commission has reason to believe that a person is engaged or about to engage in prohibited conduct and that the enjoining thereof, pending the issuance of a complaint by the Commission under Section 45 above, is in the public interest the Commission may bring suit in United States District Court for injunction. Upon proper showing, a temporary injunction or restraining order may be granted without bond, except in cases of newspapers, magazines or periodicals when injunction would delay the delivery of such due to customary business practice.[17]	Person is engaged in or is about to engage in dissemination of false advertisements pertaining to food, drugs, devices or cosmetics.

[16] Federal Trade Commission Act §5, 15 U.S.C. §45(b)-(c) (1964), 38 Stat. 719.

[17] *Id.* §13, 15 U.S.C. §53 (1964), 52 Stat. 114.

Statutory Procedure	Statutory Criteria for Invocation of Power
d. Same as above in 10.c., *supra*.[18]	Misbranding wool products.
e. Same as above in 10.c., *supra*.[19]	Misbranding fur products.
f. Same as above in 10.c., *supra*.[20]	Misbranding textile fiber products.
g. Whenever the Commission has reason to believe that any person is violating or is about to violate such rules, and that it would be in the public interest to enjoin such violation until a complaint under the FTC Act is issued and dismissed by the Commission or until an order to cease and desist made thereon by the Commission has become final or is set aside by a court of review, the Commission may bring suit in the District Court to enjoin such violation and upon proper showing a temporary injunction or restraining order shall be granted without bond.[21]	Manufacturing of, offering for sale, or importation of highly inflammable wearing apparel.

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[18] Wool Products Labeling Act of 1939 §7, 15 U.S.C. §68e(b) (1964), 54 Stat. 1131.

[19] Fur Products Labeling Act §9, 15 U.S.C. §69g(b) (1964), 65 Stat. 180.

[20] Textile Fiber Products Identification Act §8, 15 U.S.C. §70f (1964), 72 Stat. 1721.

[21] Flammable Fabrics Act §6, 15 U.S.C. §1195(a) (1964), 67 Stat. 113.

Statutory Procedure	Statutory Criteria for Invocation of Power
11. *Department of Health, Education and Welfare*	
a. The District Courts shall have jurisdiction, for cause shown, and subject to provisions of Section 381 of Title 28 (relating to notice to opposite party) to restrain violation.[22]	Adulteration or misbranding of any food, drug, device or cosmetic in interstate commerce; the introduction or delivery of such articles into interstate commerce; the introduction into interstate commerce; introduction or delivery for introduction into interstate commerce of any new drug without approval of the Secretary of HEW; the manufacture within any territory of any such adulterated or misbranded article, etc. (21 U.S.C. § 331 (1964).
b. Any such article shall be liable to be proceeded against on libel of information and condemned in any District Court. Any article condemned shall, after entry of the decree, be disposed of by destruction or sale as the court may direct.[23]	Same as in 11.a., *supra.*
c. If the Secretary (HEW) after investigation, finds danger he shall promulgate regulations providing for the issuance (to manufacturers, etc. of such class of food) of permits to which shall be attached such	Any class of food contaminated with micro-organisms during manufacturing, processing or packing that may be injurious to health.

[22] 21 U.S.C. §332 (1964), 76 Stat. 784, 793.

[23] 21 U.S.C. §334 (Supp. II, 1965-66), 79 Stat. 232.

Statutory Procedure	Statutory Criteria for Invocation of Power
conditions governing manufacturing, etc. as may be necessary to protect the public health. If conditions of permit are not met, the Secretary shall suspend immediately, upon notice, such permit.[24]	
d. The Secretary of the Treasury shall deliver to the Secretary of HEW, upon his request, samples of food, drugs, etc. being imported, giving notice thereof to the owner who may appear before the Secretary of HEW and have the right to introduce testimony. If the articles are determined to violate the law, the Secretary of Treasury shall cause destruction of any such article unless such articles are exported within 90 days after determination.[25]	Food, drugs, devices and cosmetics imported or offered for import into U. S. that have been manufactured, etc. under unsanitary conditions, or have been forbidden or restricted in sale in the country in which they were produced, or are adulterated or misbranded.
12. *Interstate Commerce Commission*	
a. The Commission is authorized, upon complaint or on its own initiative, but after notice and hearing, to investigate and determine whether any person is in violation. If	Violation of 49 U.S.C. § 5(4) – effectuating the control or management in a common interest of any two or more carriers.

[24] 21 U.S.C. §344 (1964), 52 Stat. 1048.

[25] 21 U.S.C. §381 (1964), 76 Stat. 796.

Statutory Procedure	Statutory Criteria for Invocation of Power
Commission finds violation, it shall by order require such person to take such action as may be necessary, in opinion of Commission, to prevent continuance of such violation. This provision is in addition to and not substitution for, any other enforcement provisions of Chapter.[26]	
b. A complaint by Commission alleging violation of rules is lodged with District Courts which have jurisdiction to issue writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain or compel.[27]	Combinations and consolidation of carriers for pooling or division of traffic in restraint of competition.
c. The Commission applies to the appropriate District Court for enforcement if after a hearing it determines order was regularly made and served and there was a disobedience.[28]	Failure of carriers to obey any order of Commission other than to pay money
d. The Commission is authorized upon a complaint or on its own initiative, after notice	Acquisition of control over carrier by freight forwarders or any other person controlling, con-

[26] Interstate Commerce Act §5, 49 U.S.C. §5(7) (1964), 24 Stat. 380.

[27] *Id.* §5, 49 U.S.C. §5(8) (1964), 24 Stat. 380.

[28] *Id.* §16, 49 U.S.C. §16(12) (1964), formerly 24 Stat. 384.

Statutory Procedure	Statutory Criteria for Invocation of Power
and hearing, to investigate and determine whether any person is in violation. If Commission finds violation, it shall by order require such person to take action as may be necessary to prevent continuance of such violation. Provisions are in addition to, not substitution for any other enforcement provisions.[29]	trolled by, or under common control with a freight forwarder.
e. Commission, Attorney General, or injured party may apply to District Court having jurisdiction of the parties for enforcement of such provision of chapter; court shall have jurisdiction to enforce obedience by writs of injunction.[30]	If any freight forwarder fails to comply with or operates in violation of any provision of chapter. (ICC Act, Part IV, Freight Forwarders).
13. *National Labor Relations Board*	
a. The Board has power, upon the issuance of a complaint by the Board to petition the District Court for appropriate temporary relief or restraining order. Upon filing a petition the Court shall cause notice to be served.[31]	A person has engaged in or is engaging in unfair labor practices.

[29] *Id.* §411, 49 U.S.C. §1011(d), 56 Stat. 293.

[30] 49 U.S.C. §1017(b) (Supp. II, 1965-66), 79 Stat. 650.

[31] Labor-Management Relations Act, 1947 §101, 29 U.S.C. §160(j) (1964), 61 Stat. 146.

Statutory Procedure	Statutory Criteria for Invocation of Power
b. No court shall have jurisdiction to issue a temporary or permanent injunction except after: 1. Hearing of testimony of witnesses in open court (with opportunity for cross-examination) in support of allegations of a complaint and testimony in opposition, if offered; 2. Findings of fact by the court to the effect that – a. unlawful acts have been threatened and will be committed or have been committed and will continue; b. substantial and irreparable injury to complainant's property will follow; c. harm to complainant by denial of relief will be greater than harm to defendants by the granting of relief; d. there is no adequate remedy at law; 3. That public officers charged with duty to protect complainant property are unable or unwilling to furnish adequate protection; 4. Hearing shall be held only after due and personal notice; 5. If a complainant shall allege substantial and irreparable injury to complainant's property will be unavoidable without temporary restraining order – such order may be issued upon testimony under oath.	Any labor dispute.

Statutory Procedure	Statutory Criteria for Invocation of Power
Effective for five days. Complainant must first file an undertaking with adequate security to recompense those enjoined for any loss, expense, damage caused by erroneous issuance.[32]	
c. Complainant, prior to seeking injunctive relief, must have complied with all obligations imposed by law and have made every reasonable effort to settle dispute by negotiation, arbitration or mediation.[33]	Any labor dispute.
d. No injunction or restraining order shall be granted except on basis of findings of facts made by Court and specifically limited.[34]	Any labor dispute.
e. Review by the circuit court. Appeal shall be heard and temporary injunction affirmed, modified or set aside with greatest possible expedition, giving precedence over all other cases.[35]	Temporary injunction under 29 U.S.C. § 107 (1964). Appeal by labor.

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[32]Norris-La Guardia Act §7, 29 U.S.C. §107 (1964), 47 Stat. 71.

[33]*Id.* §8, 29 U.S.C. §108 (1964), 47 Stat. 72.

[34]*Id.* §9, 29 U.S.C. §109 (1964), 47 Stat. 72.

[35]*Id.* §10, 29 U.S.C. §110 (1964), 47 Stat. 72.

Statutory Procedure	Statutory Criteria for Invocation of Power
f. No court can have jurisdiction to enjoin from doing any of the following acts – a. refusing to work; b. becoming member of labor union; c. paying participants in labor dispute; d. aiding, by unlawful means, participants in labor dispute; e. giving publicity to existence of any dispute; f. assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.[36]	Any labor dispute.
g. After notice and service of a complaint and a hearing concluding, upon a preponderance of the testimony taken by the Board, that an unfair practice exists, the Board shall issue cease and desist orders and take such affirmative action as will effectuate policies of the subchapter.[37]	A person has engaged in or is engaging in unfair labor practices.
h. When a violation is charged, preliminary investigation shall be made forthwith by the Board and given priority over all cases. If after investigation, the officer to whom matter may be referred has reasonable cause to believe	A person has engaged in an unfair labor practice within the meaning of paragraph (A), (B) or (C) of Section 158 (b) of 29 U.S.C. E.g., paragraph (4)(A) deals with a person forcing or requiring any employer or self-employed person to join

[36] *Id.* §4, 29 U.S.C. §104 (1964), 47 Stat. 70.

[37] 29 U.S.C. §160(c) (1964), 48 Stat. 926.

Statutory Procedure	Statutory Criteria for Invocation of Power
the violation exists and that a complaint should be issued, he shall petition District Court for appropriate injunctive relief pending final adjudication of the Board with respect to such matter. No temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such restraining order shall be effective for no longer than five days.[38]	labor or employer organization or to enter agreement (prohibited by 158(c)) where such employer ceases or agrees to cease handling, using, selling, transporting products of any other employer. Paragraph (4)(C) deals with forcing or requiring any employer to recognize or bargain with a particular labor organization or for a labor organization to picket or cause to be picketed any employer where an object thereof is forcing the employer to recognize or bargain with a labor organization.
i. Upon receiving report from a board of inquiry, President may direct Attorney General to petition District Court to enjoin.[39]	Threatened or actual strike or lockout affecting entirely or substantially an industry engaged in trade, commerce, transportation or communications (among any states or with foreign nations) or engaged in production of goods for commerce which if continued would imperil national health or safety.
j. The appropriate District Courts have jurisdcition, for cause shown, to restrain violations.[40]	Any violations and provisions re Minimum Wage, Maximum Hours, Child Labor, etc.

[38] 29 U.S.C. §160(1) (1964), 73 Stat. 544.

[39] Labor Management Relations Act, 1947 §208, 29 U.S.C. §178 (1964), 61 Stat. 155.

[40] Fair Labor Standards Act of 1938 §17, as amended, 29 U.S.C. §217 (1964), 75 Stat. 74.

Statutory Procedure	Statutory Criteria for Invocation of Power
14. *Securities Exchange Commission*	
a. The Commission brings action in District Court. If its allegations are established, the Court shall enjoin (permanently or temporarily) such person from acting in such capacity.[41]	Person guilty of gross misconduct or gross abuse of trust in re any registered investment company for which such person serves as officer, director, advisory board, investment adviser or depositor or principal underwriter.
b. Same as in 14.a., *supra*.[42]	Any violation of subchapter (Investment Companies), or rule, regulation, or order thereunder.
c. The Commission may, in its discretion, bring action in District Court. Upon a proper showing, a permanent or temporary injunction or decree or restraining order shall be granted.[43]	Any person is engaged in any acts or practices which constitute or will constitute a violation of the provisions of Subchapter I (Domestic Securities) of Chapter 2A, 15 U.S.C. §§ 77a-77aa, or rules, regulations and orders thereunder.
d. Same as in 14.c., *supra*.[44]	Any person is engaged in any acts or practices which constitute or will constitute a violation of the provisions of Chapter 2B (Securities Exchanges), 15 U.S.C. §§ 78a-78hh, or rules, regulations and orders thereunder.

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[41] Investment Company Act of 1940 §36, 15 U.S.C. §80a-35 (1964), 54 Stat. 841.

[42] *Id.* §42, 15 U.S.C. §80a-41 (1964), 54 Stat. 842.

[43] Securities Act of 1933 §20, 15 U.S.C. §77t (1964), 48 Stat. 86.

[44] Securities Exchange Act of 1934 §21, 15 U.S.C. §78u(e) (1964), 48 Stat. 899.

Statutory Procedure	Statutory Criteria for Invocation of Power
e. Same as in 14.c., *supra*.[45]	Any person is engaged in any acts or practices which constitute or will constitute a violation of the provisions of Chapter 2C (Public Utility Holding Companies), 15 U.S.C. §§ 79-79z-6, or rules, regulations and orders thereunder.
f. Same as in 14.c., *supra*.[46]	Any person is engaged in any acts or practices which constitute or will constitute a violation of the provisions of Subchapter II (Investment Advisers) of Chapter 2D, 15 U.S.C. §§ 80b-1 - 80b-21, or rules, regulations and orders thereunder.
15. *Small Business Administration*	
a. After an Order to Show Cause has been served upon licensee involved, containing a statement of matters of fact and law asserted, and notice of hearing, and after such hearing has been held concluding a noncompliance, the Administration may order licensee to cease and desist.[47]	Noncompliance with any provision of Chapter (representing all statutory material re Small Business Administration, enacted to aid, counsel, assist, protect and preserve free competition and enterprise) or any regulation issued thereunder.

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[45] Public Utility Holding Company Act of 1935 §18, 15 U.S.C. §79r(f) (1964), 49 Stat. 831.

[46] Investment Advisers Act of 1940 §209, 15 U.S.C. §80b-9(e) (1964), 54 Stat. 853.

[47] Small Business Investment Act of 1958 §4, as amended, 15 U.S.C. §687a(b)-(c) (Supp. II, 1965-66), 80 Stat. 1359.

Statutory Procedure	Statutory Criteria for Invocation of Power
b. Administration applies to District Court, and upon a showing, permanent or temporary injunction, restraining order may be issued.[48]	A licensee has engaged in, or is about to engage in, act violating Chapter, rule, regulations or order.
16. *Tennessee Valley Authority*	
The corporation has authority to bring appropriate proceedings in District Court to prevent, discontinue or remove unlawful construction.[49]	The construction of appurtenant works, etc., without approval or beyond approval of Board.
17. *Federal Communications Commission*	
The Commission may order such person to cease and desist from such action. Before issuing such order, the Commission shall serve an order to show cause containing the charges and calling the person to appear at a hearing no less than thirty days after the order; when safety of life or property is involved shorter notice may be given. Cease and desist order may be issued after hearing or waiver thereof and must be accompanied by findings.[50]	Where any person (1) has failed to operate as set forth in a license, (2) has violated or failed to observe any of the provisions of the Communications Act or Sections 1304, 1343 or 1464 of Title 18, U.S. Code (broadcasting lottery information, fraudulent or obscene materials), or (3) has violated or failed to observe any rule or regulation of the Commission authorized by the Communications Act or U. S. treaty.

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[48] *Id.* §311, 15 U.S.C. §687c(a) (1964), 75 Stat. 753.

[49] Tennessee Valley Authority Act of 1933 §26a, 16 U.S.C. §831y-1 (1964), 49 Stat. 1079.

[50] Federal Communications Act of 1934 §312, as amended, 47 U.S.C. §§312(b), (c) (1964), 66 Stat. 716.

SUPREME COURT, U. S.

No. [illegible]

In the Supreme Court of the United States

October Term, 1967

United States of America and Federal Communications Commission, petitioners

v.

Southwestern Cable Co., Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp.

On writ of certiorari to the United States Court of Appeals for the Ninth Circuit

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Reply Brief for the United States and the Federal Communications Commission

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Erwin N. Griswold,
Solicitor General,
Donald F. Turner,
Assistant Attorney General,
Francis X. Beytagh, Jr.,
Assistant to the Solicitor General,
Howard E. Shapiro,
Attorney,
Department of Justice,
Washington, D.C. 20530.

Henry Geller,
General Counsel,
Daniel R. Ohlbaum,
Deputy General Counsel,
Federal Communications Commission,
Washington, D.C. 20554.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 363

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., AND TRANS-VIDEO CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

I

In our principal brief we showed that CATV constitutes interstate communication by wire subject under Section 2(a) (47 U.S.C. 152(a)) to the provisions of the Communications Act; that the Commission's exercise of jurisdiction over CATV is limited to the interception and dissemination of television signals by this form of interstate wire communication; and that this jurisdiction is based upon the provisions of the Act specifically defining the Commission's responsibilities regarding broadcasting and

in particular authorizing it to provide for a nationwide plan for allocating free television service through local stations.

We also showed that, in regulating CATV systems, the Commission is not engaged in a comprehensive licensing and regulatory program. Under its Second Report and Order and the prescribed regulations the Commission exercises authority only over CATV carriage and distribution of signals broadcast by television stations. Moreover, its limitation on the importation of distant signals into major television markets is provisional in nature and is directed toward ensuring that the agency has an adequate opportunity to study and reflect, on a case-by-case basis, the public interest considerations relating to CATV growth in large metropolitan areas. In view of the restricted scope of the Commission's asserted jurisdiction and the approach initially taken by the agency, the contentions by respondents and the *amici curiae* that the Commission is claiming an unlimited and standardless regulatory authority wholly misconceive the nature of the instant case.

Respondents argue that as a matter of statutory construction the Commission lacks power to regulate CATV dissemination of television signals because the Communications Act specifically provides a comprehensive scheme of regulation only in regard to common carriers and persons actually engaged in radio transmission. In respondents' view, the jurisdiction of the Commission is rigidly compartmentalized into common carrier regulation and broadcast station

licensing, and it therefore lacks authority to regulate non-microwave CATV systems in any respect.

Plainly, however, the Commission's authority under the Act is not and was never intended to be so narrowly circumscribed. Section 2(a) by its terms applies "to *all* interstate and foreign *communication* by wire or radio * * * and to all persons engaged *within* the United States *in such communication* or such transmission of energy by radio * * *" (emphasis added). Section 3(a) (47 U.S.C. 153(a)) defines "[w]ire communication" in sweepingly broad language. Moreover, in Title III of the Act Congress conferred upon the Commission comprehensive powers and duties listed in Section 303, established a licensing scheme to allocate facilities under Section 307, and conferred rulemaking authority commensurate with these responsibilities in Sections 4(i) and 303(r). (47 U.S.C. 154(i) and 303(r)).

The essential purpose of the statutory pattern—control over all channels of radio transmission (47 U.S.C. 301)—could not be achieved if a form of interstate wire communication were able to extend and disseminate broadcast signals without regard to the Commission's regulations allocating frequencies and zones for those signals. It is not necessary for the Commission to have plenary authority over all aspects of CATV operations in order to regulate CATV at all. All that is required is that the agency have authority to adopt rules regulating CATV in the respects in which it has in fact acted. It has acted to regulate CATV only in regard to the potential impact and effect of that form of wire communication on its congressionally mandated plan for the allocation of free

television service among the various parts of the country. Surely the plain language of the Communications Act supports Commission jurisdiction to regulate CATV in that limited respect.

Respondents' position would significantly frustrate the purposes of the Act by requiring of Congress "an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219). In essence, they seek a "stereotyp[ing of] the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding" (*ibid.*). That sort of niggardly approach toward construing the scope of the Commission's powers has been consistently rejected by this Court. It was expressly rejected, in regard to the Commission's jurisdiction over non-microwave CATV, in *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, C.A.D.C., No. 20274, decided June 30, 1967, where the court of appeals concluded that the Commission's powers are not "rigidly compartmentalized into 'licensing' and 'public utility regulation' functions" (Pet. App. D 73, n. 19). Moreover, it is beside the point that the Act does not set forth express standards for the regulation of non-common carrier wire communication. Its standards for the regulation of broadcasting are quite specific—Section 303 adopts the familiar criterion of "public convenience, interest, or necessity" as the guide for exercise of the powers enumerated. When a form of wire communication involves itself with the dissemina-

tion of broadcast signals, it becomes subject to those standards. If those standards are adequate in regard to broadcasting, they are similarly sufficient for the regulation of a form of wire communication which directly relates to and affects broadcasting.

Contrary to the view of respondents, the recent enactment of the all-channel receiver law (47 U.S.C. 303(s)) does not undermine the basis of the Commission's asserted jurisdiction. This legislation reflected the desire of Congress to give greater effect to the Commission's channel-allocation plan by increasing the number of television sets capable of receiving UHF signals. But the Commission had no jurisdiction over the capabilities of home receivers because the manufacture and sale of television sets does not constitute a form of interstate communication by wire or radio. Hence, specific legislation was necessary.

Even assuming that the Act's legislative history could defeat the plain intendment of its language, it is not to the contrary. Although Congress built largely upon existing law dealing with existing modes of communication in adopting the 1934 Act, it was well aware that it was giving the Commission comprehensive powers to deal with future developments. *E.g.*, S. Rep. No. 781, 73d Cong., 2d Sess., p. 1; H. Rep. No. 1850, 73d Cong., 2d Sess., p. 3; see *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 219–220. Congress obviously did not have CATV specifically in mind in 1934, any more than it then had foreknowledge of the development of television, but it wisely delineated broad areas of regulatory authority under a public interest standard which, upon their evolution, encompasses both.

Nothing in the instant case requires a probing of the limits of the Commission's power to regulate various forms of interstate communication by wire. Each form would raise its own questions of the need for regulation and the nature and statutory basis of any proposed rules. Since the Commission has not asserted plenary authority over CATV systems, but only such authority over an activity using broadcast signals as is necessary to carry out particular statutory directives relating to broadcasting, no question is here raised regarding the nature of possible regulation of other forms of communication.[1]

Nor does the history of legislative proposals designed to confer or confirm jurisdiction over CATV reduce the Commission's powers under the Act. Al-

[1] Accordingly, any reliance on the nature of the Commission's assertion of regulatory authority over television networks is misplaced. Networks are of course subject to pervasive Commission regulation with respect to network-owned stations. And they are specifically governed by Section 303(i) (47 U.S.C. 303(i)), giving the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; the Commission has thus considered that it has ample authority to adopt rules governing networks directed both to the network affiliate and the network television licensee. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190; Notice of Proposed Rule Making and Inquiry in Docket No. 16041, concerning rules with respect to competition and responsibility in network television broadcasting (30 Fed. Reg. 7666, 7668); Notice of Proposed Rule Making in Docket No. 12782, concerning rules with respect to competition and responsibility in network television broadcasting (30 Fed. Reg. 4065). While the Commission has from time to time disclaimed direct jurisdiction over networks, no definitive resolution of that question has been made by the courts. As to other forms of wire communication (*e.g.*, Muzak, press associations), most of them differ significantly from CATV in that their activities have little if any potential impact on broadcasting.

though the 86th Congress considered certain legislative proposals respecting CATV which were submitted by the Commission and others, the Commission at that time had deliberately reserved the question whether it could regulate CATV because of its impact on its channel-allocation plan. *CATV and TV Repeater Services,* 26 F.C.C. 403, 430–431. The Senate, by a close vote, tabled a bill conferring jurisdiction, but no legislation was enacted which either increased or reduced the Commission's powers under the 1934 Act. In the 89th Congress, after the Commission's assertion of jurisdiction, confirmatory legislation was introduced (H.R. 13286) and favorably reported (H. Rep. No. 1635, 89th Cong., 2d Sess.), but the issue of the Commission's jurisdiction under existing law was in the end left open (H. Rep. No. 1635, *supra,* at p. 9). Thus, neither the Commission's own prior ruling, nor its requests for CATV legislation or the actions of Congress foreclose the issue here. In the face of CATV's burgeoning growth, old assumptions had to be reconsidered in the light of the Act's full reach (cf. *American Trucking Ass'ns* v. *Atchison, T. & S.F. R. Co.,* 387 U.S. 397, 416). Moreover, requests by an agency for congressional guidance as to or confirmation of its jurisdiction have never been viewed as establishing a lack of existing authority (*e.g., Federal Trade Commission* v. *Dean Foods Co.,* 384 U.S. 597). Congressional inaction after the Commission assertion of jurisdiction over non-microwave CATV, if it shows anything, indicates acquiescence in the Commission's reading of the Act and approval of its proposed method of regulation.

Little comment need be made on the contention of respondents Mission Cable *et al.* (Br. 35–55) that the Commission is precluded from considering the effect upon the public of a loss of free television service due to competition from outside television signals brought into a community by CATV. The public interest standard of the Act plainly contemplates and comprehends consideration of the effect of competition upon service to the public in the regulated broadcasting industry.[2] *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475–476; *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U.S. 86; *Carroll Broadcasting Co.* v. *Federal Communications Commission,* 258 F. 2d 440 (C.A.D.C.); *Carter Mountain Transmission Corp.* v. *Federal Communications Commission,* 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951.

Apart from the jurisdictional basis heretofore dis-

[2] Mission also errs in suggesting that the policy of antitrust laws forecloses Commission consideration of the economic impact of CATV on its channel-allocation plan. The antitrust laws represent a basic statutory policy which should be taken into account by regulatory agencies. Nor can administrative action authorize violation of the antitrust laws or immunize transactions from them, except as specifically provided by Congress. But respondents do not suggest any substantial basis for concluding that the Commission's general requirements for carriage of local stations, non-duplication and limitation on importation of distant signals raise any serious anticompetitive problems. In any event, despite the contrary argument in the *amicus* brief of Black Hills *et al.* (Br. 7–10, 31–36), the validity of the substantive provisions of the Commission's rules are not presently before the Court, except in the sense that they provide background relevant to resolving the questions actually at issue. At least one of respondents agrees (see Southwestern Cable Br. 15).

cussed, CATV systems are plainly "incidental" to the transmission of radio communications (47 U.S.C. 153(b)), and thus come within the regulatory authority of the Commission on this ground as well. Title III of the Act is of course concerned only with "radio transmission," but it is significant that this term, as used in Section 301 and defined in Section 3(d), "includes both such transmission and all instrumentalities, facilities, and services *incidental to such transmission*" (emphasis added). Respondents are incorrect in asserting that consideration of this ground is foreclosed under *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80. This is because the "limited office" of the *Chenery* principle (see the *Penn-Central and N & W Inclusion Cases,* Nos. 433 *et al.*, this Term, Slip op., p. 28, n. 10, p. 36, n. 14), as the opinion itself points out, is inapplicable to review of general legal standards adopted by the exercise of rulemaking powers (318 U.S. 92–93). Thus, the jurisdictional basis of agency rules may be justified on any ground supported by the pertinent legislation.[3] Indeed, in its Second Report and Order (A. 70, n. 1) the Commission stated that since CATV operations clearly fall within either Section 3(a) or 3(b), or both, a determination of their precise status was not essential to resolution of the jurisdictional question.

Finally, Mission is incorrect in its assertion (Br. 52–53) that if unlicensed CATV carriage of signals

[3] In rulemaking, it should be noted, the Administrative Procedure Act requires only a general statement of basis and purpose (5 U.S.C. (Supp. II) 553 (c)).

is found to infringe copyrights, there is no need for any Commission regulation. This argument substantially ignores one of the essential reasons for Commission assertion of jurisdiction—the economic impact of CATV upon its channel-allocation plan which could in turn have a detrimental effect on the public. That consideration would be affected only in an indirect and imprecise way by a holding that CATV activities were covered by the copyright laws. Moreover, Commission regulation is geared to promotion of Communications Act policy. The Commission in its Second Report and Order noted that CATV systems have traditionally not paid for the programming they provide and that this has had adverse competitive consequences for UHF and independent stations (A. 12–13, 54–56). And account would have to be taken by the agency of any significant change in industry operations as a result of this Court's decision in *Fortnightly Corp.* v. *United Artists Television, Inc.*, No. 618, this Term, or subsequent legislative developments, even possibly to the extent of revising certain of its regulations. But Commission jurisdiction over CATV to insure "the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)), would at all events still be appropriate and would plainly remain necessary.

II

Respondents argue that even if the Commission has jurisdiction to regulate CATV dissemination of television signals by general rule, it cannot act by interim order to maintain the status quo in a particular

market while it determines the effect on local television service of CATV expansion. Such an order, they say, is an exercise of an injunctive power—or more precisely, a kind of temporary cease-and-desist order not authorized under Section 312(b) or any other provision of the Act. Respondents contend that such authority is not conferred by the Commission's general rulemaking powers under Sections 4(i) and 303(r);[4] that Congress has been extremely cautious in granting agencies temporary injunctive jurisdiction; and that the interim stay issued here does not meet judicial standards for injunctive relief. Finally, they assert that an interim stay order cannot be analogized to a particularized rule for the Los Angeles-San Diego market and that such a rule would be arbitrary in any event. These contentions are advanced in support of a general claim that it is wholly arbitrary for the agency to reserve to itself authority to issue orders which may vary its rules or impose special requirements in particular situations. None of these claims have substantial merit.

Respondents' fundamental premise—that the interim stay order of the kind here involved is in essense a type of cease-and-desist order—is unfounded. The interim stay here seeks only to prevent temporarily an increase in the importation of Los Angeles

[4] Respondents' reading of Section 4(i) would actually render that statutory provision virtually without meaning. Moreover, if their restrictive view of Sections 4(i) and 303(r) were correct, it would appear to follow that the Commission lacked authority to enter an order at the conclusion of an evidentiary hearing, and that this would be so whether the proceeding was one under Section 74.1107 of the regulations or, like the instant case, one under Section 74.1109.

signals into the San Diego area while the Commission endeavors to determine what the effect of such CATV expansion will be on San Diego's off-the-air television service. It serves precisely the same purpose as the Commission's general rule (47 C.F.R. 74.1107) forbidding the importation of distant signals into the top 100 television markets until a case-by-case investigation and evidentiary hearing can be conducted. The only difference between the general rule and the provisions authorizing particularized relief (47 C.F.R. 74.1109)—an integral part of which is the issuance of interim stay orders—is that under the former the CATV systems must establish a need for a waiver in the light of particular circumstances. Under the more flexible procedure followed here, the local television interests involved had the burden in the first instance of establishing a need for special protection pending a complete investigation.[8]

Unlike a cease-and-desist order, which imposes a restraint to correct a violation of an established standard, the proceeding here involved is directed toward particularizing the major-market policy in the San Diego area. It is not concerned with adjudicating and correcting past violations but with establishing a standard for future CATV dissemination of broadcast tele-

[8] One of the *amici* attempts to demonstrate that Section 74.1109 of the regulations, under which the Commission acted here, is so broad as to confer unlimited and therefore arbitrary authority on the agency (Black Hills, *et al.* Br. 37–42). But that section was plainly intended as complementary to the other regulations, particularly Section 74.1107, and should be viewed as part of the overall framework established by the Commission for regulating CATV. Thus, it comes into play only in those situations not specifically covered by the general rule.

vision signals in a particular market. Thus, the issue is not whether respondents are violating existing laws and rules but whether the Commission has the power by rule, order, or a combination thereof, to maintain the status quo in a television market while it studies the potential impact of CATV carriage of certain broadcast signals on its channel-allocation plan and on the public interest in local television service. It is in this light that respondents' reiterated statement that they have violated no statute or rule in seeking to expand their systems in San Diego—that their activities are "concededly lawful"—must be evaluated. It is beside the point that respondents do not happen to be in violation of any particular regulations at the present time, and misleading to seek to attribute any significance to this verbalization. Their proposed activities are not currently unlawful only because in this class of cases—one involving overlapping Grade B contours of two major markets—the Commission determined to proceed initially through case-by-case inquiries, accompanied by temporary restraints, rather than through a blanket ban on CATV expansion pursuant to a general rule covering such relatively uncommon situations.[6]

[6] Had the Commission fashioned a blanket ban on all CATV expansion in major markets, respondents would have been faced with a general rule automatically calling for a halt in their operations, with the necessity to seek and justify a waiver of the rule in their particular case. Instead, the Commission adopted the *ad hoc* approach of Section 74.1109 in situations like the present one, which distinctly favors CATV by not restricting expansion except where the Commission specifically acts to do so after examining the pleadings in a particular case. Respondents nowhere show why the Act requires the approach of a general

Sections 4(i) and 303(r) clearly confer on the Commission the power to proceed in the manner here chosen.[7] They are not, as respondents contend, simply housekeeping or enabling provisions which relate to the control of Commission proceedings. That function is specifically performed by another provision—Section 4(j) (47 U.S.C. 154(j)). See *Federal Communications Commission* v. *Schreiber,* 381 U.S. 279, 289–294. Sections 4(i) and 303(r), in contrast, are grants of power "coterminous with the scope of agency regulation." *American Trucking Ass'ns* v. *United States,* 344 U.S. 298, 309–311. In *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, in concluding that the Commission's rulemaking authority did not depend upon and was broader than any specific statutory authorization, this Court significantly stated that "47 U.S.C. § 154(i) and § 303(r) grant general rulemaking power not inconsistent with the Act or law" (*id.* at 203). As we have shown, the scope of the Commission's authority under Section 2(a) and Title III extend to the regulation of CATV carriage and dissemination of broadcast signals. Sections 4(i) and 303(r), therefore, authorize the imposition of permanent standards governing the importation of television sig-

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rule with possible waiver rather than the more flexible method prescribed by Section 74.1109 for those situations where the public interest questions could best be resolved, even initially, only upon the basis of specific facts.

[7] Section 4(i), in addition to the general rulemaking authority conferred by Section 303(r), broadly authorizes the Commission to "perform any and all acts" and to "issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

nals. *A fortiori,* those provisions authorize the imposition of temporary restraints on system expansion where permanent rules might eventuate from detailed agency inquiry which could effectively be frustrated if if the status quo were not maintained.[8]

Whether standards are to be expressed by rule or order or, as in this case, a selective combination among all of the agency's powers, is in the first instance a matter of agency discretion. If that discretion is exercised in a reasonable fashion, and the precise manner of regulation chosen fairly comports with the language and purpose of the pertinent statutory provisions, agency action should be upheld. In light particularly of the fast-changing character of the broadcasting industry, Congress never meant to undermine its purpose in establishing the Commission by seeking to spell out in a detailed manner the exact ways in which the authority granted should be exercised. *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 219. Rather, as Congress intended, the Commis-

[8] Both the general rule limiting importation in the top 100 markets pending investigation and the particularized action taken here are temporary in nature. Both are premised upon the serious questions raised by CATV entry into the major markets and the necessity for resolving those questions before CATV becomes entrenched. Such entrenchment would not only threaten frustration of any solution the Commission might ultimately reach but also threatens possible disruption of service to the public which subscribed to CATV before the legality of its use of distant signals was defined. Not only would the removal of wires into homes be required; CATV systems do not typically afford subscribers a choice between cable and off-the-air reception (see First Report and Order, 38 F.C.C. 683, 702–703), and many systems advertise that unsightly antennae can be done away with if CATV service is obtained.

sion can utilize the full panoply of its powers to innovate by fashioning procedures for coping with new developments and to tailor those procedures to the widely varying problems a development such as CATV presents in different markets. It is not confined, as respondents seem to argue, to a choice between rule and order, as this Court made clear in *Securities and Exchange Commission* v. *Chenery,* 332 U.S. 194, 202–204:

> To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. * * *
>
> * * * Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
>
> * * * And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency. See *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 421.

Here the Commission's interim stay procedures comply with the criterion of fundamental fairness and rest upon a rational foundation. Administrative proceedings are in any event not governed by judicial standards. *Federal Communications Commission* v.

Pottsville Broadcasting Co., 309 U.S. 134, 142–144. Moreover, the interim stay order was issued only after elaborate submissions by the parties and upon a considered Commission determination that, in view of those submissions, a halt to CATV expansion in San Diego was at least temporarily required, in order to allow the Commission an adequate opportunity to investigate the matter further (A. 146–179).[9] It is difficult to conceive that a court would not issue temporary injunctive relief in similar circumstances.

Nothing in the legislative history of Sections 4(i) and 303(r), referred to by respondents, undermines reliance on those provisions as a basis for the interim stay order issued here. It shows only that Congress intended to adapt the forms of the past to the changing needs of the future. Nor is the remedial pattern expressed in statutes relating to other agencies a guide to congressional intent here. The Commission's role and powers are distinctively adapted to the broadcasting industry in which, as Congress well understood, change is the only constant. Moreover, respondents do not show that the remedial patterns prescribed for other agencies parallel that of Sections 4(i) and 303(r), or that courts, in circumstances like the present one, have barred any agencies having such broad authority from taking analogous actions. Similarly, the fact that in 1960 the

[9] Respondents ignore the fact that the Commission did not act either *ex parte* or summarily in determining to issue the instant stay order, but upon the basis of voluminous pleadings and affidavits. Moreover, respondents were aware, from participation in the extensive rulemaking proceeding and by virtue of specific references in the Second Report and Order, that the Los Angeles-San Diego situation was one as to which the Commission might find some action to restrict importation of signals appropriate (see, *e.g.*, A. 18–19).

Commission's chairman suggested that the Commission should be empowered to obtain judicial stays of activity in violation of the Act or Commission rules is of no significance. That is not the question in issue here, and in any event Congress's failure to adopt it is no indication that the power does not exist. *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 608–611.

Finally, it is inconsistent with the nature of the administrative process to suggest, as do respondents, that in circumstances such as these, an agency may not reserve to itself authority to issue orders which vary its rules or to impose special requirements as particular situations may demand.[10] Such powers are the very essence of the administrative process. They were conferred on the Commission when it was assigned its mission of regulating the broadcasting industry, and were properly exercised here to maintain temporarily the status quo in the San Diego market.

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[10] Respondents' reliance on the hearing examiner's determination that CATV development in San Diego does not presently appear to threaten local television service is misplaced. His findings are under review by the Commission which must itself decide the case on the record before it and is not bound by his determination. Moreover, respondents neglect to note that the Commission staff has concluded that the examiner's report contains numerous factual and legal errors. Significantly, in view of these exceptions, the Commission itself declined to terminate the temporary stay until it had considered the examiner's findings and reached its own decision (see *Memorandum Opinion and Order*, 11 Pike & Fischer R.R. 2d 721, 724).

CONCLUSION

For the foregoing reasons, and those stated in the principal brief for petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

FRANCIS X. BEYTAGH, JR.,
Assistant to the Solicitor General.

HOWARD E. SHAPIRO,
Attorney.

HENRY GELLER,
General Counsel,

DANIEL R. OHLBAUM,
Deputy General Counsel,
Federal Communications Commission.

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MIDWEST TELEVISION, INC., WESTERN TELECASTERS, INC., and JACK O. GROSS, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Of Counsel:

COVINGTON & BURLING
701 Union Trust Building
Washington, D. C. 20005

MILLER & SCHROEDER
1329 E Street, N.W.
Washington, D. C. 20004

ERNEST W. JENNES
CHARLES A. MILLER
701 Union Trust Building
Washington, D. C. 20005

Attorneys for Petitioners

March, 1968

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 428

MIDWEST TELEVISION, INC., WESTERN TELECASTERS, INC., and JACK O. GROSS, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO-CABLE CO., and TRANS-VIDEO CORP., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

This brief is submitted by petitioners in response to the answering and amicus briefs filed by the CATV companies.[1]

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[1] For convenience, these briefs will be designated "Southwestern," "Mission," "Black Hills," and "Alice Cable."

I. COMMISSION AUTHORITY OVER CATV TRANSMISSION OF TELEVISION SIGNALS.

Respondents and amici make no serious attempt to dispute the major arguments of petitioners in support of FCC jurisdiction over CATV television signal transmission: CATV's status as "interstate . . . communication by wire or radio" within the meaning of the Communications Act, sections 1, 2(a), 3(a), 3(b), 47 U.S.C. §§ 151, 152(a), 153(a), 153(b) (1964); the statutory powers and judicial precedents that authorize the Commission to regulate in order to carry out its basic functions; and the radical frustration of legislative purpose and federal policy that could be wrought by unregulated CATV.[2] Instead, the opposition briefs seek affirmatively to establish CATV's immunity from any and all Commission regulation through a narrowing theory of statutory intent, supposed Commission disclaimers of authority, and recent congressional inaction.

The principal contention is that the Communications Act was designed to grant authority only over common carriers and radio,[3] thus leaving a regulatory gap for wire communi-

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[2] Southwestern does impliedly question (p. 8) the need for CATV regulation by emphasizing that San Diego has only two VHF stations. As petitioners' opening brief noted (p. 16), at the time the Commission's jurisdiction was invoked San Diego was served by five stations, including three VHF carrying all three major television networks and one independent UHF commercial station (KAAR), while two further UHF stations were authorized or applied for. When the brief was filed KAAR had temporarily suspended service (p. 15 n.20) but since then has recommenced operations with new call letters under substituted petitioner Western Telecasters, Inc. The status of petitioner Gross' construction permit is being questioned at the Commission. At the same time, a UHF educational station has become operative. Thus, San Diego is presently served by six stations, including two UHF, and has one more UHF authorized. In addition, a request has been filed for assignment of still another UHF channel, FCC Rep. No. 620, Feb. 2, 1968, in addition to one already being considered (p. 16).

[3] Mission further suggests that even as to radio, the Commission is limited to licensing stations (p. 13). As petitioners' opening brief

cation conducted by noncommon carriers such as CATV (*e.g.*, Southwestern, pp. 16-17). Petitioners' opening brief has already shown that the Communications Act is no mere compilation of prior laws and "rigidly compartmentalized" powers, *Buckeye Cablevision, Inc. v. FCC*, No. 20274 (D.C. Cir., June 30, 1967), p. 7, but was intended as a grant of "additional" powers to provide a "comprehensive scheme for the regulation of interstate communication" (pp. 29-30).

Respondents' argument rests upon the *non sequitur* that a statute must be limited to its most detailed provisions and the most concrete problems that inspired it, a view this Court has never accepted. *E.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Respondents' legislative history imposes no such dichotomy as they urge;[4] Southwestern itself concedes that a number of the detailed provisions of the Act apply to all wire and radio communication whether or not by common carriers (pp. 26-27 & n.27).

But even if the Commission's authority were limited to wire common carriers and radio (Southwestern, pp. 23-24), it would not follow that CATV falls between two stools and is exempt. For, while CATV is wire communication that the Commission has not regulated as common carrier, the systems also fall within the definition of radio communication as "instrumentalities . . . incidental" to the transmission of radio signals. Section 3(b), 47 U.S.C. § 153(b)

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notes, title III of the Act in both caption and content covers "radio," not just station licensing. Southwestern itself acknowledges (p. 23) that "title III confers broad powers upon the Commission to regulate radio transmission" and designates licensing as "the basic instrument" but not the only one.

[4] Mission's quotation (p. 15 n.7) from the House report on the Communications Act plainly does not bear out Mission's suggestion that the Act made no substantive changes over prior law. The quotation itself, in referring only to common carrier regulation, says the Act is "modifying the provisions [of the prior law] so as to provide adequately" for such regulation.

(1964). Thus, the pertinent provisions of title III of the Act, "provisions relating to radio," as well as those of title I, would continue to provide a firm foundation for the CATV rules were such pigeonholing required.

Southwestern does not answer the title III contention by claiming that CATV falls outside the definition of radio communications.[5] Rather, it argues (p. 21) that the Commission's failure to rely upon CATV's status as "radio" when the CATV rules were framed prevents that assertion now under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). *Chenery* has no application here: that CATV constitutes radio communication within the statutory definition is a strict issue of law within the province of the Court to decide. The further claim by Southwestern (p. 21) that the Commission found CATV not to be radio communication in a decision almost ten years ago not only has little if any support[6] but is irrelevant as well. See pp. 7-8 *infra*.

Several related statutory arguments pressed by the CATV systems warrant but brief response. Alice Cable argues (p. 16) that inclusion of CATV within the section 3(a) and (b) definitions of wire and radio communication confers no power because many entities are defined in the Act, such as the United States, over whom no jurisdiction is granted. The argument fails to recognize that the wire and radio definitions alone are adopted by section 2(a) to establish the coverage of the

[5] There is no basis for Southwestern's warning (pp. 21-22 n.20) that reliance on title III would preempt state and local authority over CATV franchises, rates, and the like expressly preserved for them by the FCC. Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453, 466 (1965). The *Dumont* case cited by Southwestern dealt with state censorship of program content, laid down no rule of automatic preemption, and did not hold that preemption is more likely for radio communications than for wire.

[6] The somewhat ambiguous decision, CATV and TV Repeater Services, 26 F.C.C. 403, 427-29 (1959), so far as it is relevant to this point, concluded only that CATV systems were not themselves engaged in broadcasting, a view the Commission has not sought to alter (A. 8).

Communications Act. 47 U.S.C. § 2(a) (1964). See also section 1, 47 U.S.C. § 151 (1964). Another brief, recognizing that section 2(a) implements these critical definitions, says that it simply applies to wire and radio communications whatever other provisions the remainder of the Act makes applicable to them (Southwestern, p. 25). But it is the very heart of petitioners' argument in its opening brief (pp. 26-27, 31-33) that there are important "other provisions" which securely support the authority claimed. *E.g.*, sections 4(i), 303(h), 307(b), 47 U.S.C. §§ 154(i), 303(h), 307(b) (1964).

Next, the legislative history of the Act is invoked to show that press associations, and therefore their own and other noncommon carrier wire systems, were not to be regulated (Southwestern, p. 28). The very legislative history quoted shows that press association wires were excluded, not from the Act, but simply from section 3(h)'s definition of "common carriers," 47 U.S.C. § 153(h) (1964), upon whom a range of specific and onerous duties are imposed under title II. Finally, Southwestern (p. 24 n.25) suggests that even if CATV systems engaged in interstate communication by wire, they may come within the letter or spirit of section 2(b), which carves out an exception from the Act for "carriers" located solely in one state. 47 U.S.C. § 152(b) (1964).[7] This exception, however, refers only to "common carriers" – the meaning of "carrier" under section 3(h), 47 U.S.C. § 153(h) (1964) – the one class of wire and radio communication to which both the Commission and respondents agree CATV should not belong.

The CATV briefs muster a train of entities which they assert by law or reason to be outside FCC jurisdiction but might inconsistently fall within the authority now established

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[7]This reliance upon section 2(b), which leaves such carriers to state jurisdiction, must be contrasted with the persistent efforts of CATV systems when in state forums to contest any such jurisdiction on grounds of federal preemption. See petitioners' opening brief, pp. 23-24.

over CATV. Almost all these entities, even assuming an adverse impact on radio and television similar to CATV's, are immediately distinguishable because they do not constitute wire or radio communication. Failing this threshold test, which CATV meets, are such extreme examples as television viewers (Mission, p. 22), newspapers (Mission, p. 54), and theatres (Mission, p. 55). Also outside the statutory definition are networks (Southwestern, p. 29), which arrange for programs like any other packager and use transmissions like the public generally but do not themselves transmit,[8] and television sets (Alice Cable, p. 18), which are purely reception devices quite different from CATV apparatus (see petitioners' opening brief, p. 24).[9]

Of all the suggestions only the noncommon carrier wire services sometimes used by press associations, railroads, other utilities (Southwestern, p. 31) and—largely in the future—subscription television (Black Hills, pp. 21-22) might meet the initial requirement of interstate wire or radio communications. There remain significant distinctions such as the fact that these entities do not extend the range of television signals: See sections 303(h), 307(b), 47 U.S.C. §§ 303(h), 307(b) (1964). Nor do respondents adduce authorities that

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[8]The FCC has long regulated networks indirectly under section 303(i), 47 U.S.C. § 303(i) (1964), through its so-called chain broadcast rules which are addressed to the stations affiliated with the networks. National Broadcasting Co. v. United States, 319 U.S. 190 (1943). The Commission has recently attempted to assert jurisdiction directly with respect to television networks based on the notion that the companies owning the networks are also the licensees of television stations, but this question has not been resolved.

[9]The Commission's power to require that new television sets be able to receive all allocated channels derives directly from the amendatory all-channel receiver law, 76 Stat. 150 (1962), and does not depend on the scope of "wire or radio communications" or the other provisions of the original Communications Act.

would bar limited regulation of such noncommon carrier wire services should it some day prove necessary.[10]

The last group of CATV arguments allege CATV regulation to be barred by a former decision of the Commission and its unheeded requests to the Congress for CATV legislation. The key decision cited, *CATV and TV Repeater Services*, 26 F.C.C. 403, 428-29 (1959) (*e.g.*, Southwestern, p. 3), considered several proposed bases for jurisdiction over CATV and rejected some.[11] Yet not only was there no complete disavowal of authority but the Commission expressly reserved decision on whether jurisdiction might rest on sections 1, 303 and 307(b), 47 U.S.C. §§ 151, 303, 307(b) (1964), and the impact of CATV on television allocation, observing that no findings had been made of substantial adverse impact. 26 F.C.C. at 430-31.[12]

However read, *Repeater Services* would not represent a longstanding, contemporaneous agency interpretation, to which this Court has on occasion given "weight." 1 Davis, Administrative Law § 5.06 (1958). *Repeater Services* came twenty-five years after the statute's enactment, was significantly eroded three years later, see n.11 *supra*, and suc-

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[10]The Commission has in fact reserved judgment on possible regulation of subscription wire-television. See In re Amendment of Part 73, 10 P & F Radio Reg. 2d 16-17, ¶ 312 (1967).

[11]The Commission separately concluded that in licensing microwave stations, it should not take account of the harmful impact on television of the CATV signals that might be carried. 26 F.C.C. at 431-32. This decision, relating solely to microwave, was promptly discarded by the Commission. Carter Mountain Transmission Corp., 32 F.C.C. 459, 465 (1962), aff'd, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

[12]Mission's citation of the District Court's *KUTV, Inc.*, decision (p. 26 n.15) does not argue a different reading of the Commission's opinion. The first paragraph quoted by Mission concerns only the coverage of the "broadcaster" definition, and the second is true in the limited sense that in 1959 the Commission had not asserted jurisdiction because the requisite impact had not been determined.

cumbed completely two years after that when the Commission asserted jurisdiction by order and notice in 1965 (petitioners' opening brief, pp. 8-9). And, of course, even the firmest agency position can be changed if it is wrong (*id.* at 31 n.38).

As to the Commission's requests to the Congress for CATV legislation, an agency's desire for a clearer mandate and legislative guidance cannot fairly argue a present lack of authority (see petitioner's opening brief, p. 31). In point of fact the Commission reiterated its request to the Congress at the very time it issued the CATV rules (A. 63-64). Similarly, congressional failure to provide legislation can be due to any number of reasons and by itself allows no inference as to existing law. *E.g., FTC v. Dean Foods Co.*, 384 U.S. 597 (1966).[13] And the Congress' failure to act since the Second Report and Order asserted authority over CATV speaks at least as loudly for the Commission as its prior silence could against it.

II. THE COMMISSION'S POWER TO STAY CATV EXPANSION PENDING A PLENARY HEARING ON THE PUBLIC INTEREST.

Assuming *arguendo* the Commission's jurisdiction over CATV television signal transmission, the CATV systems do not attempt to refute the crucial importance, affirmed by the Commission (A. 57-60) and amplified in petitioners' opening brief (pp. 41-44), of interim relief to the success of CATV rules and the statutory public-interest goals that they serve.[14] Since temporary relief is thus patently "necessary"

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[13] United States v. Leslie Salt Co., 350 U.S. 383 (1956), cited by Southwestern (p. 39) on the importance of congressional inaction had nothing to do with requests for legislation but concerned an express administrative position left undisturbed by the Congress for over a quarter century.

[14] Southwestern does, in the context of another argument, briefly assert that the Commission could allow entrenchment during a hearing and order a subsequent cutback of CATV service (p. 61). The CATV companies, which would oppose an ordered retrenchment even

to the Commission's functions and nowhere expressly forbidden, and since section 4(i) of the Act confers power to issue rules and orders not inconsistent with the Act which meet this test of necessity, 47 U.S.C. § 154(i) (1964), respondents and amici are once again forced to prove that general language does not mean what it seems to say.

The most direct attempt to answer section 4(i) is Southwestern's claim that it does not cover the present order because it and section 303(r) were "basically enabling provisions intended to implement specific provisions" of the Act (p. 45). The interim order, like the CATV rules generally, is in fact grounded firmly in a number of "specific provisions" of the Act, notably sections 1, 303(h), and 307(b), 47 U.S.C. §§ 151, 303(h), 307(b) (1964). See petitioners' opening brief, pp. 26-27, 31-32 & n.32. Only by limiting section 4 (i) to trivia or virtual redundancy, which Southwestern's illustration shows to be its real intent,[15] can the section be removed as a basis for the order.

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more vigorously than limits on expansion, *cf.* p. 14 *infra*, may blithely ignore the difficulties in this course; but the Commission must consider among other matters (1) the harm that can be done by expanded CATV to existing local stations during the lengthy hearing period, which CATV companies are adept at prolonging, see n.24 *infra*, (2) the discouragement of new stations during the same period, (3) the permanent alteration in viewing habits that may result from expansion, (4) the financial investment and settled expectations of viewers who wire their homes and remove their outside antennas, and (5) the congressional policy in the Communications Act of determining important questions "before consequences possibly adverse to the public interest develop" (A. 57-58). See petitioners' opening brief, pp. 41-42.

[15] As its prime example of an appropriate use for section 4(i), Southwestern tenders (p. 45) the network or "chain" broadcasting rules upheld in National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Given the precise "authority to make special regulations applicable to radio stations engaged in chain broadcasting" pursuant to section 303(i), 47 U.S.C. § 303(i) (1964), reliance upon section 4 (i) would be redundant.

Additionally, *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), squarely affirms that the general power to make rules and orders is more than an adjunct to specific provisions. Expressly quoting sections 4(i), 303(f) and 303 (r), 47 U.S.C. §§ 154(i), 303(f), 303(r) (1964), the Court upheld the Commission's rules limiting multiple ownership of stations, a subject nowhere specifically covered by the Act.[16] A line of other cases construing language akin to or even less broad than section 4(i) in other regulatory statutes confirms it to be a significant grant of authority, *e.g.*, *American Trucking Ass'ns v. United States*, 344 U.S. 298 (1953); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153 (D.C. Cir. 1967), which is no less the understanding of the Congress. See S. Rep. No. 860, 87th Cong., 1st Sess. 20 (1961), quoted in *Pacific Coast European Conf. v. FMC*, 376 F.2d 785, 787 n.2 (D.C. Cir. 1967).

The next general attack on the interim order (*e.g.*, Mission, pp. 54-57) is drawn from section 312(b) of the Act, 47 U.S.C. § 312(b) (1964). Respondents' silence concedes that the interim order does not violate the express terms of that section which deals only with orders directed against violations of statute, rule, or license. Instead, the argument rests upon an inference that section 312(b) must provide the sole "injunctive power" available to the Commission else the section would have been unnecessary since the same result could have been accomplished under sections 4 (i) and 303(r).[17]

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[16] Southwestern (p. 46 n.56) would like to rest the *Storer* decision on section 313 of the Act, 47 U.S.C. § 313 (1964). That section, which simply makes the antitrust laws generally applicable to radio and provides for license revocation or denial for violators, was not relied upon by the Supreme Court.

[17] Southwestern also argues that the Congress' failure to amend section 312(b) to provide for judicial stays pending such proceedings points to a lack of power under sections 4(i) and 303(r). Congressional inaction allows no such inference (see petitioners' opening brief, p. 31), not to speak of the differences between such stays and the order here. See, *e.g.*, n.21 *infra*.

Passing the erroneous assumption that the Congress grants power only in the clear absence of existing authority and never to remove uncertainty or guide the agency's approach,[18] there are ample reasons for the enactment of section 312(b) even though section 4(i) supports the order here. The adjudication under section 312(b) of violations of statute, rule or license terms is a function the Congress could understandably resolve to spell out in detail and hedge with stringent safeguards, involving as it does both condemnation and the permanent prohibition of existing conduct. And the Communications Act is replete with court sanctions for such violations, *e.g.*, sections 401(a), 501-04, 47 U.S.C. §§ 401(a), 501-04 (1964), whose presence to deal with violations might itself have raised doubts whether Commission action was "necessary" had it sought to enjoin violations under section 4(i) in the absence of section 312 (b). In all events, the practice of granting agencies express power to adjudge and halt violations is so widespread, as Southwestern's brief demonstrates (App. E), that failure to do so might raise serious doubts of agency competence.[19]

By contrast, the interim order in this case is a temporary measure demonstrably necessary to carrying out a broad-gauged inquiry into the public interest requirements of the

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[18] Compare United States v. du Pont & Co., 353 U.S. 586 (1957) (holding section 7 of the Clayton Act applied to vertical mergers even prior to explicit amendment); O'Brien v. United States, 376 F.2d 538 (1st Cir.), cert. granted, 389 U.S. 814 (1967) (No. 232) (draft card burning statute providing same penalty for conduct already covered by existing law).

[19] The statutes of other agencies in Southwestern's compilation *all* appear to deal with the adjudication of violations (pp. E-2 to E-3). Thus, even to the limited extent disparate regulatory schemes can be compared, the compilation merely reiterates the section 312(b) argument and constitutes no proof that all grants of "injunctive" power must be similarly couched. The compilation contrasts sharply with Mission's argument, in another context, that federal agency statutes cannot be compared at all (pp. 59-62).

San Diego market.[20] It is quite unlike a section 312(b) decision whether a specific violation has occurred, which can normally be reached swiftly or without need of interim relief.[21] As petitioners' opening brief noted (p. 38), the Commission could easily have accomplished the same temporary stay of CATV expansion by a general rule covering all systems,[22] a rule which would have the same "injunctive" impact as the present order yet stand beyond even the slender inference arguments based upon section 312(b).

In choosing to proceed by particularized orders in a class of CATV cases deemed by it less suited to general rules, the Commission has exercised a normal agency prerogative. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). It is in no way "incredible" (Southwestern, p. 51) to specify different procedures for different CATV problems, differentiating by type of signal and market rank, even though a single company may present a number of problems and be subject to more than one procedure.[23] And, quite obviously, to

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[20] Rejecting claims that another order to a CATV company under 47 C.F.R. § 74.1109 (1967) conflicted with section 312, the First Circuit stated: "[W]e agree with the Commission that the proceeding shaped a rule to govern petitioners future operations; it did not try to stop violations of a license, statute, or past rule. A cease-and-desist order was not warranted and was not sought." Presque Isle TV Co. v. United States, No. 6896 (Dec. 18, 1967), pp. 7-8 n.6.

[21] The normal brevity of a section 312(b) proceeding is one reason why the Congress might reasonably fail to authorize the Commission to seek interim injunctions pending completion. Compare Southwestern, p. 49.

[22] Southwestern seeks to escape the force of this point by stating (pp. 57-59) that the facts would not have supported a general rule halting all CATV expansion. If that is the sole alternative left to the Commission, the facts would require it and they would certainly justify such a ban in "overlapping market" cases such as the present one.

[23] The *Buckeye* litigation, obscurely described by Southwestern (pp. 50-51), is illustrative. Of the nine signals carried in Toledo, Ohio, by Buckeye, one from Lansing, Michigan, was a distant signal flatly prohibited by the CATV rules, unless a waiver is first obtained. This

explain such distinctions in regulating CATV is not to argue, as Mission suggests we do (pp. 58-59), that the Commission has "greater enforcement powers with respect to CATV regulation than it has with respect to radio regulation."

In further criticism of the interim order, Southwestern (p. 60) has inadvisedly chosen to emphasize its duration, arguing that "no federal court would have imposed a restraining order of such unusual duration without an evidentiary hearing and oral argument." The interim order has remained in force so long because respondents have sought repeatedly to delay the hearing on a final order to replace the interim measure.[24] Moreover, the interim order was no "ex parte"

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importation, established in a section 312(b) proceeding, warranted a cease-and-desist order as to the Lansing signal without more ado, and Buckeye's subsequent attack on the order was rejected in Buckeye Cablevision, Inc. v. FCC, No. 20274 (D.C. Cir., June 30, 1967). In the second episode, local stations petitioned the Commission to use its reserved power under 47 C.F.R. § 1109 (1967) to halt Buckeye's importation of otherwise permissible Grade B signals from Detroit, Michigan, and Windsor, Ontario, because of adverse effects upon the public interest. Those signals presented the same "overlapping markets" danger as the instant case (see A. 62 n.69), and the Commission set the request down for a full-scale hearing on the public-interest question, granting interim relief against expanded importation of Detroit-Windsor signals as in the order attacked here. In re Buckeye Cablevision, Inc., 10 F.C.C.2d 745 (1967).

[24] Simply to choose examples, the CATV companies:

(1) appealed from an interlocutory order requiring evidence be taken on an exhibit and obtained a suspension of the hearing for two months until their appeal was rejected, Joint Application for Review, Petition for Stay, both filed April 26, 1967, FCC Docket No. 16786;

(2) twice sought to terminate or halt the Commission inquiry pending final disposition of this case, efforts which were unsuccessful but enabled respondents to postpone the hearing dates again, Petition to Deny and Other Relief, filed May 10, 1967; Tr. 3352, FCC Docket No. 16786; and

(3) effected a further delay by opposing submission of proposed findings on most issues and evidence on the date fixed by the hearing examiner on the ground that a further hearing on one exhibit was to be held, Tr. 3358, 3360-62, FCC Docket No. 16786.

measure as Southwestern alleges (p. 52), but issued upon ample notice and after the submission of manifold pleadings and written evidence by the CATV companies (A. 147). Nor have respondents sought to controvert the showing in petitioners' opening brief (pp. 52-53) that under the applicable standards the undisputed facts called for a halt on expansion.[25]

The related suggestion that a court would not issue an injunction without stronger proof of probable harm (Southwestern, p. 60) is yet more inapt. Not only could the Commission certainly anticipate "irreparable injury" in a number of forms, see n.14 *supra*, but the case for interim relief was far stronger than in the normal civil action. The dispute here is not between two private parties but weighs the claims of several commercial enterprises against the public interest of many thousands of citizens. See, *e.g.*, *R. A. Holman & Co. v. SEC*, 299 F.2d 127, 132 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 927 (D.C. Cir. 1958). Nor did the Commission interfere with existing operations but rather imposed limited restrictions on further expansion of the systems pending a hearing. Any suggestion that the Commission's CATV restrictions took Southwestern by surprise (p. 9 n.10) is unwarranted, for the Commission warned of its intention to regulate months before the system even began to lay lines, let alone to commence operations.[26]

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[25] Even assuming a court might have allowed further evidence or oral argument under its particular practice, the CATV companies give no reason or authority which would confine an administrative agency to precisely the same course. See 1 Davis, Administrative Law § 8.03 (1958).

[26] The Commission gave its warning in April 1965 in explicit terms. Notice of Inquiry and Notice of Proposed Rulemaking 1 F.C.C.2d 453, 477. Construction started after that date, Southwestern Exs., Nos. 2-3, FCC Docket No. 16786, and Southwestern began service in December 1965 (Southwestern, p. 9). Mission began some service prior to April 1965 but laid by far most of its cable and acquired most of its subscribers afterwards. Initial Decision, 11 P & F Radio Reg. 2d 273, 277-80 (1967).

An even more direct appeal to the equities of the stay order – and hence to an issue not now before the Court, see p. 17 *infra* – is Southwestern's stress upon the examiner's findings after the plenary hearing that permanent outside signal restrictions ought not be imposed. The argument ignores, of course, the examiner's conclusion that other restrictions would be needed to protect local television. Initial Decision, 11 P & F Radio Reg. 2d 273, 304 (1967). It also fails to note that the Commission staff has concluded that the examiner's report is seriously flawed and that the Commission, which has the report under review, has suggested its own doubts.[27] The argument's basic error, however, is its attempt to show a lack of power through an ex post facto suggestion that it was poorly exercised. It would be at least as legitimate for petitioners to affirm the keenness of the Commission's weighing of equities by noting that Southwestern, the weakest of the CATV systems, has steadily improved its financial position despite the limited stay.[28]

Lastly, in opposition to the temporary stay Southwestern presses several authorities. The only court decisions are *Trans-Pacific* and *Standard Airlines* (pp. 53-54), both distinguished by petitioners' opening brief on a number of grounds (pp. 47-48). Southwestern also quotes from Professor Jaffe (p. 44), who states that absent a "statutory grant" it does not "appear" that an agency may issue interim stays. Citation of this statement begs the very question whether power to issue "necessary orders" under section 4(i), which is not a

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[27]Noting, *inter alia*, that the FCC Broadcast Bureau "states that the examiner's decision contains many material errors of fact and law," which led to an incorrect ultimate result, the Commission quite properly declined to terminate the temporary stay until it had passed upon the examiner's report. Memorandum Opinion and Order, 11 P & F Radio Reg. 2d 721, 724 (1967).

[28]Memorandum Opinion and Order, 11 P & F Radio Reg. 2d 721, 725 (1967). Mission, the largest local CATV operation in the country, obviously has no complaint on this score.

standard piece of agency equipment,[29] constitutes a sufficient grant. In addition, Professor Jaffe's appraisal rests on an examination of only one case, *Trans-Pacific*, where the agency involved did not possess the "necessary orders" power.

Southwestern finally proffers a quotation from Professor Gellhorn cautioning against promiscuous use of summary interim determinations (p. 44 n.53). The caution follows a discussion of instances in which such provisional remedies have been sanctioned, Gellhorn & Byse, Administrative Law 769-74 (1960), while the unquoted remainder of the quoted paragraph urges that an opportunity be given to show "there is no good reason" for the stay, *id.* at 774—an opportunity fully afforded to respondents (petitioners' opening brief, pp. 49-50.

A final point bears emphasis in concluding this discussion: the temporary stay power fulfills the function, vital to CATV regulation at large, of preventing irreversible harm while evaluation is under way. Whether by rule or order, the entire regime of CATV regulation proceeds upon this premise (see petitioners' opening brief, pp. 14-15, 42-43). Indeed, the premise runs throughout the Communications Act itself (A. 57-58). This Court could have been addressing itself directly to CATV and the regulatory scheme applied by the FCC when it spoke of "the rapidly fluctuating factors characteristic of the evolution of broadcasting" and the "corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

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[29] It is not, for example, possessed by the Federal Trade Commission, *cf.* 15 U.S.C. § 74 (1964), the Securities & Exchange Commission, *cf.* 15 U.S.C. § 78w (1964), the Federal Maritime Commission, *cf.* 46 U.S.C. § 1114(b)(1964), the Atomic Energy Commission, *cf.* 42 U.S.C. § 2201(p) (1964), or the National Labor Relations Board, *cf.* 29 U.S.C. § 156 (1964), to speak only of the independent agencies and not of the departments.

III. ADDITIONAL CONTENTIONS RAISED BY THE RESPONDENTS AND THE AMICI.

In addition to their discussions of the jurisdictional and interim order questions, the opposing briefs – especially those of the amici curiae – seek at this late stage to interject other issues into these proceedings. These include allegations that the Communications Act as applied here and 47 C.F.R. § 74.1109 (1967) are unconstitutionally vague; that the CATV rules generally conflict with established federal policy favoring competition; and that the restrictions on CATV constitute an illegal licensing arrangement.

None of these issues is before this Court. The questions presented in our petition for certiorari (p. 2) and that of the United States and the Commission (p. 2) in No. 363 have been rephrased by respondents (Southwestern, p. 1; Mission, p. 2) and one amicus (Alice Cable, p. 2) but not altered in substance.[30] The additional questions now pressed by the CATV companies are not coincident with the questions presented nor is any a "subsidiary question fairly comprised therein," Sup. Ct. R. 40(1)(d)(1), and therefore cannot be raised by any party. Sup. Ct. R. 40(1)(d)(2), 40(3), 42(5).[31] Without abandoning our objection to their untimely appearance, a brief precautionary response on these issues will nevertheless be made.

Southwestern alone advances the claim that, as construed by the Commission and petitioners, the Communications Act is unconstitutionally vague for failure to specify standards for regulating CATV systems (pp. 34-37). The argument, which Southwestern did not consider worth raising in

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[30] The other amicus, Black Hills, has simply omitted the questions presented, thus relying on those of the parties as is permitted by Sup. Ct. R. 42(5).

[31] Indeed, if is not clear, in light of section 405 of the Communications Act, 47 U.S.C. § 405 (1964), limiting judicial review to points raised before the agency either initially or by rehearing petition, which of the added questions if any could have been brought into court.

the Court of Appeals, would have little enough merit even if the Commission had asserted plenary authority under the Act's public interest standard to grant franchises and govern CATV rates, the number of systems in an area, withdrawal of service, and like matters. The course of decisions today allows the widest latitude for administrative action[32] and cannot be overcome by citation of two 1935 cases striking down New Deal legislation (Southwestern, p. 36).[33]

In all events, the Commission has only sought to regulate CATV systems to limited extent needed to meet the goals and standards expressly set forth in sections 1, 303(h), and 307(b) of the Act, 47 U.S.C. §§ 151, 303(h), 307(b) (1964), and the congressional policy reflected in the amendatory all-channel receiver law, 76 Stat. 150 (1962), aiming at viable local UHF television. Petitioners' opening brief spells out in detail the way in which these statutory provisions not only permit but virtually compel the measures taken by the Commission (pp. 22-37, 40-44).

The claim that 47 C.F.R. § 74.1109 (1967) is itself unconstitutionally vague is made by Black Hills, which contends this reserved power to waive or alter the other CATV rules in appropriate cases is an "administrative monstrosity" and renders the whole scheme meaningless (pp. 37-42). Not surprisingly, no authority is offered for this position since *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), upheld the Commission's multiple ownership rules

[32] *E.g.*, Carlson v. Landon, 342 U.S. 524 (1952); American Power & Light Co. v. SEC, 329 U.S. 90 (1946); Fahey v. Mallonee, 332 U.S. 245 (1947); Arizona v. California, 373 U.S. 546 (1963).

[33] Of the two cases cited – Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935), and Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) – Professor Davis says: "These two cases are the only ones invalidating congressional delegations to governmental authorities. The Panama case, except in its own unique setting, is of questionable authority today . . . . The Schecter case involved the most sweeping congressional delegation of all times." 1 Davis, Administrative Law § 2.06, at 99-100 (1958) (footnotes omitted).

precisely *because* they included a general waiver provision for cases outside the run of the mill.

Far from authorizing arbitrary action, 47 C.F.R. § 74.1109 (1967) is employed, as the Commission's decision in this case shows (A. 161-63), in accord with the basic standards explicit throughout the CATV rules and the Second Report and Order. In essence, CATV is under no circumstances prohibited but rather its importation of outside signals is regulated and even such importation is permitted save in instances where it would infringe on the establishment and healthy development of local television broadcasting. *E.g.*, A. 52, 57; 47 C.F.R. §§ 74.1107(a), (d) (1967). Any exercise of the reserved power can be challenged in court if it does not conform to these standards. The aim, in short, is not to evade standards but on the contrary to approach them more closely in the odd cases that do not fit rules framed for the average situation.

Mission urges that the CATV rules are inconsistent with the "national policy in favor of competition" (p. 36). To describe the appropriation of another's programs without consent as "competition" is a curious use of the phrase even on the open market.[34] In the regulated realm of interstate wire and radio communication, the cases make it clear beyond debate that the Commission may take full account of economic impact in carrying out the aims of the statute and pursuing the public interest. *E.g., FCC v. Sanders Radio Station*, 309 U.S. 470 (1940); *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

The *Sanders* case, cursorily described by Mission (p. 40 n.18), held that "resulting economic injury to a rival station

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[34] Not only is this practice forbidden to other radio stations by the express language of section 325 of the Act, 47 U.S.C. § 325 (1964), but it seriously impairs the legitimate acquisition by local stations of rights to make the first showing of a film or series in the area (A. 54-55).

is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the [Commission] must weigh" in passing on license applications, 309 U.S. at 473, explicitly noting that the Commission could certainly consider "competition" in the public interest context. *Id.* at 475-76. Other decisions on which Mission relies (pp. 36, 38, 44, 50) have nothing to do with the factors the FCC may weigh but concern the claims of various regulated industries that they are thereby exempt from the further regulation of the antitrust laws.[35]

Finally, Black Hills advances the view that the CATV rules at large comprise an illegal "licensing" scheme (pp. 33-38). The CATV rules do not "license" within the meaning of the Act, section 3(c), 47 U.S.C. § 153(c) (1964), and the Commission does not pass on the eligibility of system operators or otherwise grant or approve the transfer of operating authority of systems, as it does with radio station licensees. See, *e.g.*, *Akron Telerama, Inc.*, 7 F.C.C.2d 809, 815 (1967). Franchising is left to state and local authorities, see n.5 *supra*, and permission under the CATV rules to import outside signals is most truly akin to allocation of a television channel to a city under the table of assignments, a proceeding not deemed to be licensing. See, *e.g.*, *Transcontinent TV Corp. v. FCC*, 308 F.2d 339 (D.C. Cir. 1962).

But however the rules may be characterized for one purpose or another, Black Hills offers nothing new to show their illegality.[36] Whether or not the rules fall within the

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[35] Other general references to show that not all aspects of radio are regulated and that the Commission is not the guarantor of individual stations (pp. 38-39, 41) are equally correct and equally irrelevant.

[36] Black Hills does argue (p. 36) that the CATV rules do not follow the "license" revocation procedures of section 312(a), 47 U.S.C. § 312 (a) (1964). That section explicitly concerns itself with "station licenses" and, as noted, CATV systems are not station licensees or regulated as such under title III of the Act. Additionally, the Commission has never authorized in any fashion the expanded CATV operations which are the subject of the temporary stay in this case.

licensing definition of the Administrative Procedure Act (p. 34), there is not even a suggestion in the brief that that statute's licensing requirements have been violated. Nor would Black Hills have been any happier had the Commission imposed a blanket ban on outside signal importation, a restraint no one could characterize as licensing at all. The bulk of the licensing argument in fact turns out to be the respondents' own well-worn contention, now dressed up in rhetoric about licensing, that the Communications Act does not extend to CATV.

CONCLUSION

For the reasons stated in this reply and in petitioners' opening brief, the decision below should be reversed.

Respectfully submitted,

ERNEST W. JENNES
CHARLES A. MILLER
701 Union Trust Building
Washington, D. C. 20005
Attorneys for Petitioners
Midwest Television, Inc.
Western Telecasters, Inc.
Jack O. Gross

Of Counsel:
COVINGTON & BURLING
701 Union Trust Building
Washington, D. C. 20005
MILLER & SCHROEDER
1329 E Street, N. W.
Washington, D. C. 20004

March, 1968

SUPREME COURT OF THE UNITED STATES

Nos. 363 AND 428.—OCTOBER TERM, 1967.

United States et al., Petitioners, 363 v. Southwestern Cable Co. et al. Midwest Television, Inc., et al., Petitioners, 428 v. Southwestern Cable Co. et al.	On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 10, 1968.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

These cases stem from proceedings conducted by the Federal Communications Commission after requests by Midwest Television [1] for relief under §§ 74.1107 [2] and

[1] Midwest's petition was premised upon its status as licensee of KFMB–TV, San Diego, California. It is evidently also the licensee of various other broadcasting stations. See Second Report and Order, 2 F. C. C. 2d 725, 739.

[2] 47 CFR § 74.1107 (a) provides that "[n]o CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year." San Diego is the nation's 54th largest television market. *Midwest Television, Inc.*, 11 Pike & Fischer R. R. 2d 273, 276.

74.1109[3] of the rules promulgated by the Commission for the regulation of community antenna television (CATV) systems. Midwest averred that respondents' CATV systems transmitted the signals of Los Angeles broadcasting stations into the San Diego area, and thereby had, inconsistently with the public interest, adversely affected Midwest's San Diego station.[4] Midwest sought an appropriate order limiting the carriage of such signals by respondent's systems. After consideration of the petition and of various responsive pleadings, the Commission restricted the expansion of respondents' service in areas in which they had not operated on February 15, 1966, pending hearings to be conducted on the merits of Midwest's complaints.[5] 4 F. C. C. 2d 612.

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[3] 47 CFR § 74.1109 creates "procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes." It provides that petitions for special relief "may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted." 47 CFR § 74.1109 (b). Provisions are made for comments or opposition to the petition, and for rejoinders by the petitioner. 47 CFR §§ 74.1109 (d), (e). Finally, the Commission "may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate." 47 CFR § 74.1109 (f).

[4] Midwest asserted that respondents' importation of Los Angeles signals had fragmented the San Diego audience, that this would reduce the advertising revenues of local stations, and that the ultimate consequence would be to terminate or to curtail the services provided in the San Diego area by local broadcasting stations. Respondents' CATV systems now carry the signals of San Diego stations, but Midwest alleged that the quality of the signals, as they are carried by respondents, is materially degraded, and that this serves only to accentuate the fragmentation of the local audience.

[5] February 15, 1966, is the date on which grandfather rights accrued under 47 CFR § 74.1107 (d). The initial decision of the

On petitions for review, the Court of Appeals for the Ninth Circuit held that the Commission lacks authority under the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151, to issue such an order.[6] 378 F. 2d 118. We granted certiorari to consider this important question of regulatory authority.[7] 389 U. S. 911. For reasons that follow, we reverse.

I.

CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers.[8] CATV systems

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hearing examiner, issued October 3, 1967, concluded that permanent restrictions on the expansion of respondents' services were unwarranted. *Midwest Television, Inc.*, 11 Pike & Fischer R. R. 2d 273. The Commission has declined to terminate its interim restrictions pending consideration by the Commission of the examiner's decision. *Midwest Television, Inc.*, 11 Pike & Fischer R. R. 2d 721.

[6] The opinion of the Court of Appeals could be understood to hold either that the Commission may not, under the Communications Act, regulate CATV, or, more narrowly, that it may not issue the prohibitory order involved here. We take the court's opinion, in fact, to have encompassed both positions.

[7] We note that the Court of Appeals for the District of Columbia has concluded that the Communications Act permits the regulation of CATV systems. See *Buckeye Cablevision, Inc.* v. *F. C. C.*, — U. S. App. D. C. —, — F. 2d —.

[8] CATV systems are defined by the Commission for purposes of its rules as "any facility which . . . receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." 47 CFR § 74.1101 (a).

characteristically do not produce their own programming,[9] and do not recompense producers or broadcasters for use of the programming which they receive and redistribute.[10] Unlike ordinary broadcasting stations, CATV systems commonly charge their subscribers installation and other fees.[11]

The CATV industry has grown rapidly since the establishment of the first commercial system in 1950.[12] In the late 1950's, some 50 new systems were established each year; by 1959, there were 550 "nationally known and identified" systems serving a total audience of 1,500,000 to 2,000,000 persons.[13] It has been more recently estimated that "new systems are being founded at a rate of more than one per day, and . . . subscribers signed on at the rate of 15,000 per month."[14] By late 1965, it was reported that there were 1,847 operating CATV systems, that 758 others were franchised but not yet in operation, and that there were 9[illegible] applications

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[9] There is, however, no technical reason why they may not. See Note, The Wire Mire: The FCC and CATV, 79 Harv. L. Rev. 366, 367. Indeed, the examiner was informed in this case that respondent Mission Cable TV "intends to commence program origination in the near future." *Midwest Television, Inc., supra,* at 283.

[10] The question whether a CATV system infringes the copyright of a broadcasting station by its reception and retransmission of the station's signals is presented in *Fortnightly Corp. v. United Artists TV, Inc.*, No. 618, now pending before the Court.

[11] The installation costs for CATV systems in 16 Connecticut communities were, for example, found to range from $31 to $147 per home. M. Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry 24 (1965).

[12] CATV systems were evidently first established on a noncommercial basis in 1949. H. R. Rep. No. 1635, 89th Cong., 2d Sess., 5.

[13] CATV and TV Repeater Services, 26 F. C. C. 403, 408; Note, The Wire Mire: The FCC and CATV, *supra,* at 368.

[14] Note, The Wire Mire: The FCC and CATV, *supra,* at 368.

for additional franchises.[15] The statistical evidence is incomplete, but, as the Commission has observed, "whatever the estimate, CATV growth is clearly explosive in nature." Second Report and Order, 2 F. C. C. 2d 725, 738, n. 15.

CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals.[16] In 1959, only 50 systems employed microwave relays, and the maximum distance over which signals were transmitted was 300 miles; by 1964, 250 systems used microwave, and the transmission distances sometimes exceeded 665 miles. First Report and Order, 38 F. C. C. 683, 709. There are evidently now plans "to carry the signals of New York City independent stations by cable to . . . upstate New York, to Philadelphia, and even as far as Dayton." [17] And see *Chan-*

[15] Second Report and Order, 2 F. C. C. 2d 725, 738. The franchises are granted by state or local regulatory agencies. It was reported in 1965 that two States, Connecticut and Nevada, regulate CATV systems, and that some 86% of the systems are subject at least to some local regulation. Seiden, *supra*, at 44–47. See Conn. Gen. Stat. Rev., Tit. 16, c. 289 (1958); Nev. Stat. 1967, c. 458.

[16] The term "distant signal" has been given a specialized definition by the Commission, as a "signal which is extended or received beyond the Grade B contour of that station." 47 CFR § 1101 (i). The Grade B contour is a line along which good reception may be expected 90% of the time at 50% of the locations. See 47 CFR § 73.683 (a).

[17] Note, The Wire Mire: The FCC and CATV, *supra*, at 368 (notes omitted).

nel 9 Syracuse, Inc. v. *F. C. C.*, — App. D. C. —, 385 F. 2d 969; *Hubbard Broadcasting, Inc.* v. *F. C. C.*, — App. D. C. —, 385 F. 2d 979. Thus, "while the CATV industry originated in sparsely settled areas and areas of adverse terrain . . . it is now spreading to metropolitan centers . . . ." First Report and Order, *supra*, at 709. CATV systems, formerly no more than local auxiliaries to broadcasting, promise for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas throughout the country.[18]

The Commission has on various occasions attempted to assess the relationship between community antenna television systems and its conceded regulatory functions. In 1959, it completed an extended investigation of several auxiliary broadcasting services, including CATV. CATV and TV Repeater Services, 26 F. C. C. 403. Although it found that CATV is "related to interstate transmission," the Commission reasoned that CATV systems are neither common carriers nor broadcasters, and therefore are within neither of the principal regulatory categories created by the Communications Act. *Id.*, at 427–428. The Commission declared that it had not been given plenary authority over "any and all enterprises which happen to be connected with one of the many aspects of communications." *Id.*, at 429. It refused to premise regulation of CATV upon assertedly adverse consequences for broadcasting, because it could not "determine where the impact takes effect, although we recognize that it may well exist." *Id.*, at 431.

The Commission instead declared that it would forthwith seek appropriate legislation "to clarify the situa-

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[18] It has thus been suggested that "a nationwide grid of wired CATV systems interconnected by microwave frequencies and financed by subscriber fees, may one day offer a viable economic alternative to the adversiser-supported broadcast service." Levin, New Tech-

tion." *Id.*, at 438. Such legislation was introduced in the Senate in 1959,[19] favorably reported,[20] and debated on the Senate floor.[21] The bill was, however, ultimately returned to committee.[22]

Despite its inability to obtain amendatory legislation, the Commission has, since 1960, gradually asserted jurisdiction over CATV. It first placed restrictions upon the activities of common carrier microwave facilities that serve CATV systems. See *Carter Mountain Transmission Corp.*, 32 F. C. C. 459, aff'd 321 F. 2d 359. Finally, the Commission in 1962 conducted a rule-making proceeding in which it re-evaluated the significance of CATV for its regulatory responsibilities. First Order and Report, *supra*. The proceeding was explicitly restricted to those systems that are served by microwave, but the Commission's conclusions plainly were more widely relevant. The Commission found that "the likelihood or probability of [CATV's] adverse impact upon potential and existing service has become too substantial to be dismissed." *Id.*, at 713–714. It reasoned that the importation of distant signals into the service areas of local stations necessarily creates "substantial competition" for local broadcasting. *Id.*, at 707. The Commission acknowledged that it could not "measure precisely the degree of . . . impact," but found that "CATV competition can have a substantial negative effect upon station audiences and revenues . . . ." *Id.*, at 710–711.

The Commission attempted to "accommodat[e]" the interests of CATV and of local broadcasting by the imposition of two rules. *Id.*, at 713. First, CATV systems

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nology and Old Regulation in Radio-Spectrum Management, 56 Am. Econ. Rev. 339, 341.

[19] See S. 2653, 86th Cong., 1st Sess.

[20] S. Rep. No. 923, 86th Cong., 1st Sess.

[21] See 106 Cong. Rec. 10416–10436, 10520–10548.

[22] *Id.*, at 10547. The Commission in 1966 made additional efforts to obtain suitable modifications in the Communications Act. See n. 30, *infra*.

were required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals.[23] Second, CATV systems were forbidden to duplicate the programming of such local stations for periods of 15 days before and after a local broadcast. See generally First Report and Order, *supra*, at 719–730. These carriage and nonduplication rules were expected to "insur[e] many stations' ability to maintain themselves as their areas' outlets for highly popular network and other programs . . . ." *Id.*, at 715.

The Commission in 1965 issued additional notices of inquiry and proposed rule-making, by which it sought to determine whether all forms of CATV, including those served only by cable, could properly be regulated under the Communications Act. 1 F. C. C. 2d 453. After further hearings, the Commission held that the Act confers adequate regulatory authority over all CATV systems. Second Report and Order, *supra*, at 728–734. It promulgated revised rules, applicable both to cable and to microwave CATV systems, to govern the carriage of local signals and the nonduplication of local programming. Further, the Commission forbade the importation by CATV of distant signals into the 100 largest television markets, except insofar as such service was offered on February 15, 1966, unless the Commission has previously found that "it would be consistent with the public interest . . . particularly the establishment and healthy maintenance of television broadcast service in the area." *Id.*, at 781–785; 47 CFR § 74.1107 (c). Finally, the

[23] See generally First Report and Order, *supra*, at 716–719. The Commission held that a CATV system must, within the limits of its channel capacity, carry the signals of stations that place signals over the community served by the system. The stations are to be given priority according to the strength of the signal available in the community, with the strongest signals given first priority. Exceptions are made for situations in which there would be substantial duplication or in which an independent or noncommercial station would be excluded. *Id.*, at 717.

Commission created "summary, non-hearing procedures" for the disposition of applications for separate or additional relief. 2 F. C. C. 2d, at 764; 47 CFR § 74.1109. Thirteen days after the Commission's adoption of the Second Report, Midwest initiated these proceedings by the submission of its petition for special relief.

II.

We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court. The issues in these cases are only two: whether the Commission has authority under the Communications Act to regulate CATV systems, and, if it has, whether it has, in addition, authority to issue the prohibitory order here in question.[24]

The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio . . . ." 47 U. S. C. § 152 (a). The Commission's responsibilities are no more narrow: it is required to endeavor to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service . . . ." 47 U. S. C. § 151. The Commission was expected to serve as the "single Government agency" [25] with "unified jurisdiction" [26] and

[24] It must also be noted that the CATV systems involved in these cases evidently do not employ microwave. We intimate no views on what differences, if any, there might be in the scope of the Commission's authority over microwave and nonmicrowave systems.

[25] The phrase is taken from the message to Congress from President Roosevelt, dated February 26, 1934, in which he recommended the Commission's creation. See H. R. Rep. No. 1850, 73d Cong., 2d Sess., 1.

[26] S. Rep. No. 781, 73d Cong., 2d Sess., 1.

"regulatory authority over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." [27] It was for this purpose given "broad authority." [28] As this Court emphasized in an earlier case, the Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the [broadcasting] industry." *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137.

Respondents do not suggest that CATV systems are not within the term "communication by wire or radio." Indeed, such communications are defined by the Act so as to encompass "the transmission of . . . signals, pictures, and sounds of all kinds," whether by radio or cable, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission." 47 U. S. C. §§ 153 (a), (b). These very general terms amply suffice to reach respondents' activities.

Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates.[29] We

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[27] *Ibid.* The Committee also indicated that there was a "vital need" for such a commission, with jurisdiction "over all these methods of communication." *Ibid.*

[28] The phrase is taken from President Roosevelt's message to Congress. H. R. Rep. No. 1850, *supra*, at 1. The House Committee added that "the primary purpose of this bill [is] to create such a commission armed with adequate statutory powers to regulate all forms of communication . . . ." *Id.*, at 3.

[29] Respondents assert only that this "is subject to considerable question." Brief for Respondent Southwestern Cable Co. 24, n. 25. They rely chiefly upon the language of § 152 (b), which provides that nothing in the Act shall give the Commission jurisdiction over "carriers" that are engaged in interstate communication solely through physical connection, or connection by wire or radio,

may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that "is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 279.

Nonetheless, respondents urge that the Communications Act, properly understood, does not permit the regulation of CATV systems. First, they emphasize that the Commission in 1959 and again in 1966 [30] sought legislation that would have explicitly authorized such regulation, and that its efforts were unsuccessful. In the circumstances here, however, this cannot be dispositive.

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with the facilities of another carrier, if they are not directly or indirectly controlled by such other carrier. The terms and history of this provision, however, indicate that it was "merely a perfecting amendment" intended to "obviate any possible technical argument that the Commission may attempt to assert common-carrier jurisdiction over point-to-point communication by radio between two points within a single State . . . ." S. Rep. No. 1090, 83d Cong., 2d Sess., 1. See also H. R. Rep. No. 910, 83d Cong., 2d Sess. The Commission and the respondents are agreed, we think properly, that these CATV systems are not common carriers within the meaning of the Act. See 47 U. S. C. § 153 (h); *Frontier Broadcasting Co.* v. *Collier*, 24 F. C. C. 251; *Philadelphia Television Broadcasting Co.* v. *F. C. C.*, — U. S. App. D. C. —, 359 F. 2d 282; CATV and TV Repeater Services, *supra*, at 427–428.

[30] See H. R. 13286, 89th Cong., 2d Sess. The bill was favorably reported by the House Committee on Interstate and Foreign Commerce, H. R. Rep. No. 1635, 89th Cong., 2d Sess., but failed to reach the floor for debate.

The Commission's requests for legislation evidently reflected in each instance both its uncertainty as to the proper width of its authority and its understandable preference for more detailed policy guidance than the Communications Act now provides.[31] We have recognized that administrative agencies, should, in such situations, be encouraged to seek from Congress clarification of the pertinent statutory provisions. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47.

Nor can we obtain significant assistance from the various expressions of congressional opinion that followed the Commission's requests. In the first place, the views of one Congress as to the construction of a statute adopted many years before by another Congress has "very little, if any, significance." *Rainwater* v. *United States*, 356 U. S. 590, 593; *United States* v. *Price*, 361 U. S. 304, 313; *Haynes* v. *United States*, 390 U. S. 85, 87, n. 4. Further, it is far from clear that Congress believed, as it considered these requests for legislation, that the Commission did not already possess regulatory authority over CATV. In 1959, the proposed legislation was preceded by the Commission's declarations that it "did not intend to regulate CATV," and that it preferred to recommend the adoption of legislation that would impose specified requirements upon CATV systems.[32] Congress may well have been more troubled by the Commission's unwillingness to regulate than by any fears that it was

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[31] See, for the legislation proposed in 1959, CATV and TV Repeater Services, *supra*, at 427–431, 438–439. The Commission in 1966 explicitly stated in its explanation of its proposed amendments to the Act that "we believe it highly desirable that Congress . . . confirm [the Commission's] jurisdiction and . . . establish such basic national policy as it deems appropriate." H. R. Rep. No. 1635, *supra*, at 16.

[32] See S. Rep. No. 923, 86th Cong., 1st Sess., 5–6.

unable to regulate.[33] In 1966, the Commission informed Congress that it desired legislation in order to "confirm [its] jurisdiction and to establish such basic national policy as [Congress] deems appropriate." H. R. Rep. No. 1635, 89th Cong., 2d Sess., 16. In response, the House Committee on Interstate and Foreign Commerce said merely that it did not "either agree or disagree" with the jurisdictional conclusions of the Second Report, and that "the question of whether or not . . . the Commission has authority under present law to regulate CATV systems is for the courts to decide . . . ." *Id.*, at 9. In these circumstances, we cannot derive from the Commission's requests for legislation anything of significant bearing on the construction question now before us.

Second, respondents urge that § 152 (a)[34] does not independently confer regulatory authority upon the Commission, but instead merely prescribes the forms of communication to which the Act's other provisions may

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[33] Thus, the Senate Committee on Interstate and Foreign Commerce observed in its 1959 Report that although the Commission's staff had recommended that authority be asserted over CATV, the Commission had "long hesitated," and had only recently made clear "that it did not intend to regulate CATV systems in any way whatsoever." S. Rep. No. 923, *supra*, at 5. Nonetheless, it must be acknowledged that the debate on the Senate floor centered on the broad question whether the Commission should have authority to regulate CATV. See, *e. g.*, 106 Cong. Rec. 10426.

[34] 47 U. S. C. § 152 (a) provides that "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone."

separately be made applicable. Respondents emphasize that the Commission does not contend either that CATV systems are common carriers, and thus within Subtitle II of the Act, or that they are broadcasters, and thus within Subtitle III. They conclude that CATV, with certain of the characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither, eludes altogether the Act's grasp.

We cannot construe the Act so restrictively. Nothing in the language of § 152 (a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio . . . ." Similarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical communication . . . ." S. Rep. No. 830, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *F. C. C.* v. *Pottsville Broadcasting Co., supra,* at 138, that it conferred upon the Commission a "unified jurisdiction" [35] and "broad authority." [36] Thus, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *F. C. C.* v. *Pottsville Broadcasting Co., supra,* at 138. Congress in 1934 acted in a field

[35] S. Rep. No. 781, *supra,* at 1.

[36] H. R. Rep. No. 1850, *supra,* at 1.

that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 219. We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over "all interstate . . . communication by wire or radio." [37]

Moreover, the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities. Congress has imposed upon the Commission the "obligation of providing a widely dispersed radio and television service," [38] with a "fair, efficient, and equitable distribution" of service among the "several States and communities." 47 U. S. C. § 307 (b). The Commission has, for this and other purposes, been granted authority to allocate broadcasting zones or areas, and to provide regulations "as it may deem necessary"

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[37] Respondents argue, and the Court of Appeals evidently concluded, that the opinion of the Court in *Regents* v. *Carroll*, 338 U. S. 586, supports the inference that the Commission's authority is limited to licensees, carriers, and others specifically reached by the Act's other provisions. We find this unpersuasive. The Court in *Carroll* considered the very general contention that the Commission had been given authority "to determine the validity of contracts between licensees and others." *Id.*, at 602. It was concerned, not with the limits of the Commission's authority over a form of communication by wire or radio, but with efforts to enforce a contract that had been repudiated upon the demand of the Commission. The Court's discussion of the Commission's authority under § 303 (r), see *id.*, at 600, must be read in that context, and as such it cannot be controlling here.

[38] S. Rep. No. 923, *supra*, at 7. The Committee added that "Congress and the people" have no particular interest in the success of any given broadcaster, but if the failure of a station "leaves a community with inferior service," this becomes "a matter of real and immediate public concern." *Ibid.*

to prevent interference among the various stations. 47 U. S. C. § 303 (f), (h). The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that "all communities of appreciable size [will] have at least one television station as an outlet for local self-expression." [39] In turn, the Commission has held that an appropriate system of local broadcasting may be created only if two subsidiary goals are realized. First, significantly wider use must be made of the available ultra-high frequency channels.[40] Second, communities must be encouraged "to launch sound and adequate programs to utilize the television channels now reserved for educational purposes." [41] These subsidiary goals have received the endorsement of Congress.[42]

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[39] Sixth Report and Order, 17 Fed. Reg. 3905. And see Staff of the Senate Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., The Television Inquiry: The Problem of Television Service for Smaller Communities 3–4 (Comm. Print 1959). The Senate Committee has elsewhere stated that "[t]here should be no weakening of the Commission's announced goal of local service." S. Rep. No. 923, *supra*, at 7.

[40] The Commission has allocated 82 channels for television broadcasting, of which 70 are in the UHF portion of the radio spectrum. This permits a total of 861 VHF stations and 1,544 UHF stations. H. R. Rep. No. 1559, 87th Cong., 2d Sess., 2. In December 1964, 454 VHF stations were on the air, 25 permittees were not operating, and 11 applications were awaiting Commission action, leaving 63 unreserved VHF allocations available. Seiden, *supra*, at 10. At the same time, 90 UHF stations were operating, 66 were assigned but not operating, 52 applications were pending before the Commission, and 1,108 allocations were still available. *Ibid.* The Commission has concluded that, in these circumstances, "an adequate national television broadcasting system can be achieved" only if more of the available UHF channels are utilized. H. R. Rep. No. 1559, *supra*, at 4.

[41] S. Rep. No. 67, 87th Cong., 2d Sess., 8–9. The Committee indicated that it was "of utmost importance to the Nation that a

[*Footnote 42 on page 17*]

The Commission has reasonably found that the achievement of each of these purposes is "placed in jeopardy by the unregulated explosive growth of CATV." H. R. Rep. No. 1635, 89th Cong., 2d Sess., 6. Although CATV may in some circumstances make possible "the realization of some of the [Commission's] most important goals," First Report and Order, *supra*, at 699, its importation of distant signals into the service areas of local stations may also "destroy or seriously degrade the service offered by a television broadcaster," *id.*, at 700, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations.[43] In particular,

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reasonable opportunity be afforded educational institutions to use television as a noncommercial educational medium." *Id.*, at 3. Similarly, the House Committee on Interstate and Foreign Commerce has concluded that educational television will "provide a much needed source of cultural and informational programming for all audiences . . . ." H. R. Rep. No. 1559, *supra*, at 3. It is thus an essential element of "an adequate television system." *Id.*, at 4. See also H. R. Rep. No. 572, 90th Cong., 1st Sess.; S. Rep. No. 222, 90th Cong., 1st Sess.

[42] Legislation was adopted in 1962 to amend the Communications Act in order to require that all television receivers thereafter shipped in interstate commerce for sale or resale to the public be capable of receiving both UHF and VHF frequencies. 76 Stat. 150. The legislation was plainly intended to assist the growth of UHF broadcasting. See H. R. Rep. No. 1559, *supra*. Moreover, legislation has been adopted to provide construction grants and other assistance to educational television systems. 76 Stat. 68, 81 Stat. 365.

[43] See generally Second Report and Order, *supra*, at 736–745. It is pertinent that the Senate Committee on Interstate and Foreign Commerce feared even in 1959 that the unrestricted growth of CATV would eliminate local broadcasting, and that, in turn, this would have four undesirable consequences: (1) the local community "would be left without the local service which is necessary if the public is to receive the maximum benefits from the television medium"; (2) the "suburban and rural areas surrounding the central community may be deprived not only of local service but of any service at all"; (3) even "the resident of the central community may be deprived of all service if he cannot afford the connection charge

the Commission feared that CATV might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters.[44] The Commission acknowledged that it could not predict with certainty the consequences of unregulated CATV, but reasoned that its statutory responsibilities demand that it "plan in advance of foreseeable events, instead of waiting to react to them." *Id.*, at 701. We are aware that these consequences have been variously estimated,[45]

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and monthly service fees of the CATV system"; (4) "[u]nrestrained CATV, booster, or translator operation might eventually result in large regions, or even entire States, being deprived of all local television service—or being left, at best, with nothing more than a highly limited satellite service." S. Rep. No. 923, *supra*, at 7–8. The Committee concluded that CATV competition "does have an effect on the orderly development of television." *Ibid.*

[44] The Commission has found that "we are in a critical period with respect to UHF development. Many of the new UHF stations will face considerable financial obstacles." First Report and Order, *supra*, at 712. It concluded that "one general factor giving cause for serious concern," *ibid.*, was that there is "likely" to be a "severe" impact between new local stations, particularly UHF stations, and CATV systems. *Id.*, at 713. Further, the Commission believed that there was danger that CATV systems would "siphon off sufficient local financial support" for educational television, with the result that such stations would fail or not be established at all. It feared that "the loss would be keenly felt by the public." Second Report and Order, *supra*, at 761. The Commission concluded that the hazards to educational television were "sufficiently strong to warrant some special protection . . . ." *Id.*, at 762. Similarly, a recent study has found that CATV systems may have a substantial impact upon station revenues, that many stations, particularly in small markets, cannot readily afford such competition, and that in consequence a "substantial percentage of potential new station entrants, particularly UHF, are likely to be discouraged . . . ." Fisher & Ferrall, Community Antenna Television Systems and Local Television Station Audience, 80 Q. J. Econ. 227, 250.

[45] Compare the following. Seiden, *supra*, at 64–90; Note, The Federal Communications Commission and Regulation of CATV, 43

but must conclude that there is substantial evidence that the Commission cannot "discharge its overall responsibilities without authority over this important aspect of television service." Staff of Senate Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., The Television Inquiry: The Problem of Television Service for Smaller Communities 19 (Comm. Print 1959).

The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems. We have elsewhere held that we may not, "in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes." *Permian Basin Area Rate Cases*, — U. S. —, —. Compare *National Broadcasting Co.* v. *United States*, *supra*, at 219–220; *American Trucking Assns.* v. *United States*, 344 U. S. 298, 311. There is no such evidence here, and we therefore hold that the Commission's authority over "all interstate . . . communication by wire or radio" permits the regulation of CATV systems.

N. Y. U. L. Rev. 117, 133–139; Note, The Wire Mire: The FCC and CATV, *supra*, at 376–383; Fisher & Ferrall, *supra*. We note, in addition, that the dispute here is in part whether local, advertiser-supported stations are an appropriate foundation for a national system of television broadcasting. See generally Coase, The Economics of Broadcasting and Government Policy, 56 Am. Econ. Rev. 440; Greenberg, Wire Television and the FCC's Second Report and Order on CATV Systems, 10 J. Law & Econ. 181.

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152 (a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," as "public convenience, interest or necessity requires." 47 U. S. C. § 303 (r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.

III.

We must next determine whether the Commission has authority under the Communications Act to issue the particular prohibitory order in question in these proceedings. In its Second Report and Order, *supra,* the Commission concluded that it should provide summary procedures for the disposition both of requests for special relief and of "complaints or disputes." *Id.,* at 764. It feared that if evidentiary hearings were in every situation mandatory they would prove "time consuming and burdensome" to the CATV systems and broadcasting stations involved. *Ibid.* The Commission considered that appropriate notice and opportunities for comment or objection must be given, and it declared that "additional procedures, such as oral argument, evidentiary hearing, or further written submissions" would be permitted "if they appear necessary or appropriate . . . ." *Ibid.* See 47 CFR § 74.1109 (f). It was under the authority of these provisions that Midwest sought, and the Commission granted, temporary relief.

The Commission, after examination of various responsive pleadings but without prior hearings, ordered that respondents generally restrict their carriage of Los Angeles signals to areas served by them on February 15, 1966, pending hearings to determine whether the carriage of such signals into San Diego contravenes the public interest. The order does not prohibit the addition of new subscribers within areas served by respondents on February 15, 1966; it does not prevent service to other subscribers who began receiving service or who submitted an "accepted subscription request" between February 15, 1966, and the date of the Commission's order; and it does not preclude the carriage of San Diego and Tiajuana, Mexico, signals to subscribers in new areas of service. 4 F. C. C. 2d 612, 624–625. The order is thus designed simply to preserve the situation as it existed at the moment of its issuance.

Respondents urge that the Commission may issue prohibitory orders only under the authority of § 312 (b), by which the Commission is empowered to issue cease-and-desist orders. We shall assume that, consistent with the requirements of § 312 (c), cease-and-desist orders are proper only after hearing or waiver of the right to hearing. Nonetheless, the requirement does not invalidate the order issued in this case, for we have concluded that the provisions of §§ 312 (b), (c) are inapplicable here. Section 312 (b) provides that a cease-and-desist order may issue only if the respondent "has violated or failed to observe" a provision of the Communications Act or a rule or regulation promulgated by the Commission under the Act's authority. Respondents here were not found to have violated or to have failed to observe any such restriction; the question before the Commission was instead only whether an existing situation should be preserved pending a determination "whether respond-

ents' present or planned CATV operation are consistent with the public interest and what, if any, action, should be taken by the Commission." 4 F. C. C. 2d, at 626. The Commission's order was thus not, in form or function, a cease-and-desist order that must issue under §§ 312 (b), (c).[46]

The Commission has acknowledged that, in this area of rapid and significant change, there may be situations in which its generalized regulations are inadequate, and special or additional forms of relief are imperative. It has found that the present case may prove to be such a situation, and that the public interest demands "interim relief . . . limiting further expansion," pending hearings to determine appropriate Commission action. Such orders do not exceed the Commission's authority. This Court has recognized that "the administrative process [must] possess sufficient flexibility to adjust itself" to the "dynamic aspects of radio transmission," *National Broadcasting Co.* v. *United States, supra,* at 219, and that it was precisely for that reason that Congress declined to "stereotyp[e] the powers of the Commission to specific details . . . ." *Ibid.* And compare *F. C. C.* v. *Pottsville Broadcasting Co., supra,* at 138; *American Trucking Assns.* v. *United States,* 344 U. S. 298, 311; *R. A. Holman & Co.* v. *S. E. C.,* 299 F. 2d 127, 131–132. Thus, the Commission has been explicitly authorized to issue "such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions." 47 U. S. C. § 154 (i). See also 47 U. S. C. § 303 (r). In these cir-

[46] Respondents urge that the legislative history of § 312 (b) indicates that the Commission may issue prohibitory orders only under, and in conformity with, that section. We find this unpersuasive. Nothing in that history suggests that the Commission was deprived of its authority, granted elsewhere in the Act, to issue orders "necessary in the execution of its functions." 47 U. S. C. § 154 (i). See also 47 U. S. C. § 303 (r).

cumstances, we hold that the Commission's order limiting further expansion of respondents' service pending appropriate hearings did not exceed or abuse its authority under the Communications Act. And there is no claim that its procedure in this respect is in any way constitutionally infirm.

The judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consistent with this opinion. *It is so ordered.*

MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 363 AND 428.—OCTOBER TERM, 1967.

United States et al., Petitioners, 363 v. Southwestern Cable Co. et al. Midwest Television, Inc., et al., Petitioners, 428 v. Southwestern Cable Co. et al.	On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 10, 1968.]

MR. JUSTICE WHITE, concurring in the result.

My route to reversal of the Court of Appeals is somewhat different from the Court's. Section 2 (a) of the Communications Act, 47 U. S. C. § 152 (a), says that "[t]*he provisions of this chapter* shall apply to all interstate and foreign communication by wire or radio . . . ." (Emphasis added.) I am inclined to believe that this section means that the Commission must generally base jurisdiction on other provisions of the Act. This position would not, however, require invalidation of the assertion of jurisdiction before us today. Section 301, 47 U. S. C. § 301, gives the Commission broad authority over broadcasting, and § 303, 47 U. S. C. § 303, confers authority to "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the the provisions of this chapter" and also the authority to establish areas or zones to be served by any station. The Commission has ample power under these provisions to prevent a Los Angeles television broadcaster from interfering with broadcasting in San Diego. For example, the Commission could stop a Los Angeles television station from owning and operating a wire CATV system which carried the station's sig-

nals into San Diego. The Commission should also be able to prevent a third party from disrupting Commissioned-licensed broadcasing in the San Diego market.

Even if §§ 301 and 303 in themselves furnish insufficient basis for the Commission to enjoin extraneous interference with the San Diego broadcasting scheme it has authorized, § 2 (a), *supra,* makes the provisions of the Act, including §§ 301 and 303, applicable to all wire and radio communication. Hence the Commission is authorized to regulate wire communications to implement the ends of §§ 301 and 303, and authorized as well to use its express authority over broadcasting to enforce its specific powers over common carriers by wire.